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# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 97

THE UNITED STATES, PETITIONER

vs.

PERCY K. HUDSON

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 2, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

# SUPREME COURT OF THE UNITED STATES

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## PERCY K. HUDSON

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In Court of Claims

Docket No. 42,828

PERCY K. HUDSON, PETITIONER

*vs.*

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed Oct. 11, 1934

*To the Court of Claims of the United States and to the Honorable Judges Thereof:*

The above-named plaintiff, by Lord, Day & Lord, his attorneys, by this petition respectfully says:

1. This is an action to test the constitutionality of the Silver Purchase Act of 1934 in so far as it attempts to levy and collect a tax on transfers of any interest in silver bullion made and completed prior to the date of enactment of said Act.

2. On May 23, 1934, and May 29, 1934, the petitioner transferred certain interests in silver bullion at a price which exceeded the cost thereof and allowed expenses. Thereafter on June 19, 1934, the Silver Purchase Act of 1934 was approved and became law; and it purported to tax such transfers if made on or after May 15,
2 1934, even though made and completed prior to the date of final approval of said Act. The said Act was originally approved by the House of Representatives on May 31, 1934; it was amended by the Senate and approved by the Senate as amended on June 11, 1934; and the amendments were accepted by the House and the bill as amended was finally approved by it on June 13, 1934.

3. On or about the 30th day of July 1934, the petitioner made his return to the Collector of Internal Revenue of the Second District of New York (the district in which the principal place of business of the petitioner was then located) showing all transfers of any interest in silver bullion made by him after May 15, 1934, and before June 19, 1934, on official forms 4 (silver) and 3-a (silver).

4. Upon said return taxes were assessed against the petitioner in the sum of $4,311, which taxes were paid by the petitioner on or about July 30, 1934, to the Collector of Internal Revenue of the Second District of New York.

5. On information and belief the petitioner avers that the said $4,311 was thereafter turned over and deposited by the Collector of

Internal Revenue to whom said payment was made by the petitioner, into the Treasury of the United States of America, as in the course of his official business.

6. On August 23, 1934, the petitioner duly filed with the Collector of Internal Revenue for the Second District of New York a claim for refund of said $4,311, being the amount of the taxes paid in respect of the transfer of his interests in silver bullion.

3 7. On October 1, 1934, the petitioner's claim for refund was rejected in full by the Commissioner of Internal Revenue and the sum of $4,311 is now wrongfully retained and withheld from the petitioner without his consent and against his will by the United States of America.

8. The provisions of law and Treasury Regulations on which the petitioner relies in support of his claim, are as follows:

Revenue Act of 1926

"SEC. 800. * * * there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule.

"Subdivision 10 of Schedule A of Title VII of the Revenue Act of 1926, as Added by Sections 8 of the Silver Purchase Act of 1934

"10. Silver, and so forth, sales and transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof

4 and allowed expenses, 50 per centum of the amount of such excess. * * * On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the taxes thereon * * * this subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on and after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulation prescribe, and the requirement of a memorandum of such transfer shall not apply * * *."

"Regulations 85 relating to tax on transfers of interest in silver bullion under Title 8, Schedule A, Subdivision 10 of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934.

"Chapter VII, Art. 70. Returns.—Every person who on or after May 15, 1934 and before the enactment of the Silver Purchase Act of 1934, made any transfer of any interest in silver bullion shall, on or before July 31, 1934, file with the Collector for the District in which is located his principal place of business (or if none, his residence) or if he has no principal place of business or residence in the United States, with the Collector at Baltimore, Md.,
5 a return in duplicate under oath on form 4 (silver) showing all such transfers * * *"

"Article 71. *Payment of Tax.*—The total tax shown on the return shall be paid to the Collector at the time the return is filed."

9. The petitioner claims that the above mentioned taxes of $4.311 were unlawfully assessed and that the above quoted provisions of law under which the said taxes were assessed are unconstitutional in so far as they apply to transfers made and completed prior to the enactment or final approval of the Silver Purchase Act of 1934 on June 19, 1934.

10. No other action than as aforesaid has been had on this claim in Congress or in any of the departments. The petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States; he has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; he is and always has been the sole owner of the claim here presented; he has made no assignment or transfer of said claim or any part thereof or any interest therein; and he is justly entitled to the amount claimed from the United States of America after allowing all just credits and setoffs.

11. The petitioner believes the facts as herein above stated to be true.

WHEREFORE, the petitioner prays judgment against the United States of America upon the facts and law for $4.311, together
6 with proper interest thereon and his reasonable costs and disbursements herein.

PERCY K. HUDSON,
*Petitioner.*

LORD, DAY & LORD,
*Attorneys for the Petitioner,*
*25 Broadway, New York, New York.*

[*Duly sworn to by Percy K. Hudson, jurat omitted in printing.*]

7 II. *General traverse*

Filed Nov. 20, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,
*Assistant Attorney General.*

III. *Argument and submission of case*

This case was argued and submitted on merits on June 4, 1935, by Mr. Bernhard Knollenberg, for plaintiff, and by Mr. George H. Foster, for defendant.

8 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J.*

Filed November 4, 1935

Mr. Bernhard Knollenberg for plaintiff. Mr. Herbert Brownell, Jr., and Lord, Day & Lord were on the briefs.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Frank J. Wideman, for defendant. Messrs. Alanson W. Willcox and Loren P. Oakes were on the brief.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

*Special findings of fact*

The plaintiff sold futures contracts for the delivery of silver, the details of the said sales being as follows:

*Silver futures contracts*

| No. of ounces | Date bought | Date sold | Cost | Selling price | Allowed expenses | Profit | Tax paid |
|---|---|---|---|---|---|---|---|
| 25,000 | 5-3-34 | 5-23-34 | $10,950 | $11,400 | $33.42 | $416.58 | $208.29 |
| 100,000 | " | " | 43,400 | 45,300 | 133.59 | 1,766.41 | 883.21 |
| 125,000 | " | " | 54,287.50 | 56,625 | 167.01 | 2,170.49 | 1,085.25 |
| 25,000 | " | " | 10,860 | 11,325 | 33.42 | 431.58 | 215.79 |
| 75,000 | " | " | 32,587.50 | 33,975 | 100.20 | 1,287.30 | 643.65 |
| 50,000 | " | 5-29-34 | 21,750 | 22,650 | 66.81 | 833.19 | 416.60 |
| 100,000 | " | " | 43,450 | 45,300 | 133.59 | 1,716.41 | 858.21 |
| 500,000 | | | 217,285 | 226,575 | 668.04 | 8,621.96 | 4,311.00 |

On July 30, 1934, in obedience to the requirements of the Silver Purchase Act of 1934, the plaintiff filed silver tax returns with the collector of internal revenue for the second district of New York covering all futures transactions in silver bullion consummated by him or his agents for his account between May 15, 1934, and June

19, 1934. The said returns set forth the facts stated above. The total tax liability shown in the returns, i. e., $4,311.00, was paid by the plaintiff on July 30, 1934, to the said collector and deposited by the latter in the Federal Reserve Bank, New York, New York, for the account of the Treasury of the United States.

9 On August 23, 1934, the plaintiff filed an adequate claim for the refund of the tax so paid. This claim for refund was rejected.

*Conclusion of law*

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $4,311, with interest as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of four thousand three hundred and eleven dollars ($4,311), with interest at the rate of six percent per annum from July 30, 1934, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

*Opinion*

GREEN, Judge, delivered the opinion of the court:

The act of June 19, 1934, known as the Silver Purchase Act of that date, provided for the purchase by the Government of silver, and among other things amended schedule A of title VIII of the Revenue Act of 1926 relating to stamp taxes by adding thereto a provision imposing a tax on "transfers of any interest in silver bullion" if the price exceeds cost thereof and allowed expenses, the rate of the tax being fixed at 50 per centum of the amount of such excess. The statute further provided that the payment of the tax should be made by affixing stamps in value equal to the tax on the transfer to a memorandum made and delivered by the transferor to the transferee. The term "transfer" was defined to mean a sale, agreement of sale, or agreement to sell.

On May 3, 1934, agents of the plaintiff bought in several transactions 500,000 ounces of silver bullion and this silver was sold by plaintiff during the period from May 23, 1934, to May 29, 1934, inclusive. On these sales the plaintiff realized (after deducting allowed expenses) a profit of $8,621.96 of which he made the return required by law and paid a tax in the sum of $4,311. In due time and in proper form the plaintiff filed a claim for refund of this amount based upon the alleged invalidity of the tax.

The plaintiff contends that in the instant case the tax is invalid and unconstitutional for the reason that it was retroactively imposed. This constitutes the sole issue in the case.

The mere fact that a taxing statute has retroactive effect is not sufficient by itself and alone to establish its invalidity. This is shown by numerous decisions cited by counsel for defendant, none of which,

however, as we think, are parallel as to facts with the case now before us.

Counsel for plaintiff also cite many cases in which a tax imposed retroactively was held to be invalid, but in nearly all of these cases the decision was based upon facts in the case then presented to the court and no general rule was laid down. The plaintiff relies largely upon the decisions in Nichols v. Coolidge, 274 U. S. 531, Untermyer v. Anderson, 276 U. S. 440, and Milliken v. United States, 283 U. S. 15. We think putting these decisions together, it may be said that they hold in effect that if at the time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by a subsequent statute. In the case of Milliken v. United States, supra, it was said that in Nichols v. Coolidge, supra, and Untermyer v. Anderson, supra, the basis of the decision was "that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax", and by reason of this fact, in both of these cases, the tax was held invalid.

On behalf of the defendant it is contended that these decisions have no application to the case at bar for several reasons which we will next consider.

It is said that the tax was necessary in order to enforce the Silver Purchase Act. A similar argument was made in support of the statute in the Untermyer case, supra, and rejected by the majority of the court. We do not think it necessary to discuss the principles upon which that decision is based as we are clear that in the instant case the tax served no purpose except to add to the revenue of the Government, and the argument of defendant rests on a mistaken premise of fact.

It may be conceded that it was to the interest of the Government to prevent the price of silver which was intended to be brought from being forced up by speculative purchases. But the application of the tax could have only a negligible effect in this respect. It is a matter of common knowledge that the United States produces only a comparatively small portion of the world's stock of silver. The silver required to be purchased must necessarily be obtained from abroad and its price would be determined by what foreign owners thought they could get for it. Counsel for defendant call attention to the fact that after the passage of the act purchases of silver on the New York market dropped off to an inconsiderable amount and it is said that this showed the act was effective. It was—in the way of stopping speculation in silver on the New York market—but it had, of course, no effect on speculation in other markets such as those of Canada and Great Britain. Outside of the United States speculation would still continue, and it would be very easy for an American citizen to make his purchases in Canada. The committee report states in effect that the purpose of the bill was to equitably reimburse the Government for the increase which its

action might bring to the price of silver. It might do this to some small extent, but this is purely a revenue proposition.

What we have said above applies to purchases and sales of silver after the passage of the act and when the Government had begun action thereunder. Then, as we have said above, if one contemplating the purchase of silver knew that a heavy tax would be imposed on any gain which resulted therefrom he would be quite likely to refrain from making the purchase in this country. But when the purchase was made before the silver purchase law was proposed, as it was in the instant case, we are at a loss to understand how putting a tax on the profits which might be made from subsequent
11 sales could by any possibility affect the workings of the act. The purchase had already been made. If it or any number of purchases made before the act was contemplated had any effect upon the price of silver, putting a tax on the sale would not change the result. We may concede, as we have above, that the tax might have some effect in the way of stopping future purchases of silver in this country but after the purchase has been made a tax levied upon the profits therefrom can serve no purpose but to bring some revenue into the Treasury. The market price of silver would remain the same to the Government or any other party and the enforcement of the act would in no way be assisted by the application of the tax under the circumstances presented by the plaintiff's case.

It is also urged on behalf of the defendant that the retroactive feature of the tax must be sustained as an incident to the exercise of the monetary power of Congress. The purchase of silver may be so sustained, but we think it has been shown above that in making the tax apply to purchases made prior to the enactment of the statute nothing was done which in any way assisted in carrying out the objects of the Silver Purchase Act. The particular provision in controversy is therefore not an exercise of the monetary power of the Government but of its taxing power, and this contention also must be overruled.

It is also argued that in its practical effect the tax is one upon income and that being an income tax it can be imposed retroactively.

At the outset it will be observed that the tax is specifically designated as a stamp tax, is paid by means of stamps, the Government itself has administered the act as a stamp tax, and a Treasury decision has been promulgated to the effect that the amount of this tax was deductible in determining the net income of the taxpayer. It is true that the amount of the tax is measured by the profits made, but we do not think this makes it an income tax. So far as we are aware, the precise question now being considered has not been ruled upon in any of the decisions of the Federal courts but in many cases it has been held in effect that the measure of a tax does not determine its nature. This tax is outside of the income tax and in addition thereto. It is plain that Congress did not regard it as an income tax. When Congress considered the provision in question to be a stamp tax and the Government officials so treated it, how could the taxpayer be expected to regard it as an income tax?

It has often been held that the income tax may be levied retroactively, at least so as to include all of the year during which the taxing act became a law. But there is an important difference between the income tax and a tax of the nature involved in the instant case. The income tax is a general tax on all income. It would make no difference to the taxpayer whether he knew in advance that it was to be levied; he would continue his business transactions in the same manner in any event, for it is a continuing tax, usually divided for convenience in collection into periods of one year. But here we have a tax that is levied upon a particular transaction or transactions. It is not an amendment to the income-tax provisions but would be collected if they were all repealed. If the taxpayer had been forwarned the situation would have been very different, for he could then take his choice. He could avoid the risk of loss on the sale and payment of a heavy tax if there was a profit simply by not entering into the transaction, but after he had made the purchase his status was fixed and he was caught by a taxing statute which he had no reason to anticipate.

Counsel for defendant cite some cases in which it has been held that where an excise tax exists with reference to a particular transaction the tax may be increased subsequent thereto and made to retroactively apply to the whole of the current year. Updike v. United States, 8 Fed. (2d) 913, is cited in support of defendant's position and it is assumed that an excess-profits tax is not an income tax for which no authority is found in the opinion rendered thereon. We have no occasion to pass on the question thus raised, for whether the excess-profits tax be considered an income or an excise tax the rule would be the same and for the same reason, as stated in the opinion, namely, that it "applied to all corporate operations within that calendar year." The opinion merely emphasizes the difference in the nature of the tax involved in the instant case which applies only to a certain kind of transactions, and a tax like the income tax or excess-profits tax which applies to all business transactions during the current year.

The fact that the President's message which suggested levying the tax was delivered before the sales were made does not prevent the application of the rule. Plaintiff bought the silver presumably for sale and when the provision for the tax was passed by Congress it imposed a burden upon him which he could not escape if the act was valid. The act which caused the tax to be applied was the act of purchase. We are of the opinion that the case clearly comes under the rule as stated in Milliken v. United States, supra, in that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time he made the purchases and we are therefore constrained to hold that the tax was invalid.

In so doing we are not unmindful of the rule that acts of Congress should not be held invalid except where there is no doubt that they are unconstitutional, but we encounter no doubt in making the deci-

sion. It should perhaps be noted that our conclusion can affect only a very few cases so far as the silver act is concerned. A contrary decision, however, if ultimately sustained, would have a very far-reaching effect in enabling similar retroactive taxes to be imposed on practically every kind of business transaction which involved a purchase and sale.

Judgment will be rendered in favor of plaintiff as prayed in his petition.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

13 V. *Judgment*

At a Court of Claims held in the City of Washington on the 4th day of November, A. D., 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $4,311, with interest.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff recover of and from the United States the sum of four thousand three hundred and eleven dollars ($4,311), with interest at the rate of six percent per annum from July 30, 1934, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

VI. *Proceedings after entry of judgment*

On January 3, 1936, the defendant filed a motion for an extension of time within which to file a motion for a new trial, of ten (10) days.

Said motion was allowed by the court on January 3, 1936.

On January 7, 1936, the defendant filed a motion for new trial.

On March 2, 1936, the court, by Green, J., filed the following opinion on the defendant's motion for new trial:

14 VII. *Opinion of the court by Green, J., on defendant's motion for new trial*

Filed March 2, 1936

GREEN, Judge, delivered the opinion of the court:

In the motion for new trial filed by defendant it is argued that the opinion of the court has placed the decision in a large measure upon the date of the purchase rather than the date of the transfer, but it was not intended by what was said in the opinion to make the date of purchase controlling. Such a rule would render an ordinary sales tax invalid as to articles that had been purchased prior to its enactment. The fact that at the time of the purchase of the silver the

plaintiff had not received the slighest intimation that such a tax would be enacted is one of the circumstances of the case which bears on the question of whether the tax, like the retroactive gift tax considered in Untermyer v. Anderson, 276 U. S. 440, is arbitrary and invalid under the due process clause of the Fifth Amendment.

In Milliken v. United States, 283 U. S. 15, the gift tax of the revenue act of 1924 was characterized as "novel." It was indeed an innovation, no such tax ever having been imposed before in this or any other country, although it was subsequently adopted by some other nations. The tax now under consideration was also novel. It was neither an income tax nor an ordinary sales or excise tax.

No such tax had been levied before in the United States nor so
15 far as we can find, in any country. It applied only to a particular kind of transactions and imposed a very heavy tax upon any profits that might be derived therefrom without any reference to other income or losses on the part of the taxpayer. In Untermyer v. Anderson, supra, a tax upon gifts made prior to the passage of the act imposing it was held so palpably arbitrary and unreasonable as to infringe the due process clause of the Constitution, notwithstanding the fact that the bill imposing the tax was introduced before the gifts were made. This case disposes of the contention that the tax under consideration was valid because the President had recommended it in a message presented to Congress before the sales were made upon which the tax was assessed. The mere fact that the tax was retroactive does not by itself and alone render it invalid, but the tax was so novel and, we might say, extraordinary, that the rules laid down in Untermyer v. Anderson, supra, and Milliken v. United States, supra, apply; and, under all the circumstances, its assessment against plaintiff must be held invalid. In connection with the tax it will also be observed that it manifestly was not levied for the purpose of obtaining revenue but for the purpose of putting a stop to certain transactions which in themselves were perfectly legal.

The motion for new trial will be overruled. It is so ordered.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

15 VIII. *Order overruling defendant's motion for new trial*

IT IS ORDERED this 2nd day of March, A. D., 1936, that the defendant's motion for new trial be and the same is hereby overruled.

16 [Clerk's Certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File no. 40, 637. Court of Claims. Term No. 97. The United States, petitioner, vs. Percy K. Hudson. Petition for a writ of certiorari and exhibit thereto. Filed June 2, 1936. Term No. 97 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

Supreme Court of the United States

*Order allowing certiorari*

Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# In the Supreme Court of the United States

OCTOBER TERM 1936

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No. 97

THE UNITED STATES, PETITIONER

*v.*

PERCY K. HUDSON

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled cause.

### OPINION BELOW

The opinion of the Court of Claims is reported in 12 F. Supp. 620. Supplemental opinion overruling motion for new trial is reported in 13 F. Supp. 640.

### JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1935. The order of the Court of Claims overruling the motion for a new trial was entered on March 2, 1936. The jurisdiction of

this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the application of the tax provided for in the Silver Purchase Act of 1934, enacted June 19, 1934 to transfers consummated on May 23 and May 29, 1934, is valid and constitutional under the due process clause of the Fifth Amendment.

### STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix (*infra,* pp. 11–15).

### STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

On May 3, 1934, respondent purchased futures contracts for the delivery of 500,000 ounces of silver, of which he sold contracts for 350,000 ounces on May 23, 1934, and 150,000 ounces on May 29, 1934, at a profit of $8,621.96. On July 30, 1934, respondent filed a silver tax return on the foregoing transactions pursuant to the Silver Purchase Act of 1934, see *infra,* p. 12, approved June 19, 1934, and duly paid a tax thereon in the amount of $4,311. On August 23, 1934, respondent filed claim for refund of the entire amount of tax so paid, which claim was duly rejected (Spl. Fdgs. of Fact).

Respondent brought suit in the Court of Claims on October 11, 1934, and on November 4, 1935, ob-

tained a judgment for $4,311, representing the entire amount of tax paid.

### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the application of the Silver Purchase Act of 1934 to a period prior to its enactment was arbitrary, invalid and unconstitutional under the due process clause of the Fifth Amendment.

2. In failing to hold that the application of the Silver Purchase Act of 1934 to a period prior to its enactment was a valid and proper exercise of the taxing power of Congress.

3. In holding that the Silver Purchase Act of 1934 as here applied could not be sustained as a necessary adjunct to the exercise of the monetary power of Congress.

4. In failing to hold that the Silver Purchase Act of 1934 as here applied could be sustained as an incident to the proper and valid exercise of the monetary power of Congress.

5. In giving judgment in favor of the respondent.

6. In failing to dismiss the petition and give judgment in favor of the United States.

### REASONS FOR GRANTING THE WRIT

1. The sole issue in the case, as recognized by the lower court, is the power of Congress in the exercise of its revenue and monetary powers to tax

profits resulting from sales of silver made within a limited period (approximately one month) immediately prior to the enactment of a statute containing a similar tax as to such sales in the future and providing a comprehensive system for regulating the monetary value of silver. The case will not only control a considerable number of other instances in which taxes totalling approximately $400,000 are imposed by the Silver Purchase Act, but involves an important constitutional question of general applicability as to the power of Congress to prevent tax evasion or profiteering at the public expense on the basis of prospective revenue or monetary legislation, the enactment of which has become almost certain. The questions thus presented are, we submit, plainly of such importance as to warrant review by this Court.

2. The decision of the Court of Claims is in conflict with the principles applicable to tax legislation having retroactive effect enunciated by this Court in *Cooper* v. *United States*, 280 U. S. 409, and *Milliken* v. *United States*, 283 U. S. 15.

The sales of futures contracts here involved were already subjected to a transfer tax under subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. Furthermore, the tax in fact is upon income resulting from silver transactions.[1] That income, like other income of

[1] It is to be noted that not only were the costs and certain expenses deductible, but during the retroactive period active traders in silver were in general permitted to offset losses

respondent's, was subject to the usual income tax, which might, it seems clear, have singled out particular classifications of income for special rates. See *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d); *Updike* v. *United States*, 8 F. (2d) 913 (C. C. A. 8th); cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Shaffer* v. *Carter*, 252 U. S. 37, 55. The power of Congress to treat as income "gains from prior but recent transactions" cannot be questioned. *Cooper* v. *United States, supra*, p. 411; *Updike* v. *United States, supra*. Surely under these circumstances respondent "should be regarded as taking his chances of any increase in the tax burden." See *Milliken* v. *United States*, *supra*, p. 23.

Like that in the *Milliken* case, *supra*, the tax here assailed had a special justification. Aside from all other considerations, the retroactive provisions of the Silver Purchase Act of 1934 should be sustained, we submit, as an incident to the exercise of the powers of Congress (Cf. *Milliken* v. *United States, supra*, p. 24), particularly since the profit taxed was largely the result of governmental

against profits. T. D. 4450 and Coll. Mim. 4211 (published in XIII-2 C. B., at pp. 549 and 539, respectively). In view of the extensive powers of Congress with respect to the allowance of deductions (see *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, 381) the resulting tax was, it is submitted, an income tax within the meaning of the Sixteenth Amendment. Cf. *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d). And see *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Shaffer* v. *Carter*, 252 U. S. 37, 55.

action in the effectuation of a monetary policy and since the tax was expressly designed,[2] among other things, to protect the Government from unreasonable profiteering at its expense.

A brief recital of the oustanding events preceding the enactment of the Silver Purchase Act clearly reveals that this legislation was part of a unified program of the Government looking to the regulation of the currency of the nation and the development of an improved monetary system. By the Act of May 12, 1933 (48 Stat. 51) the Presi-

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[2] See the report of the House Ways and Means Committee (H. Rep. No. 1801, 73d Cong., 2d Sess., p. 3):

"By such acquisitions the price of silver and gold may also be brought into more proper adjustment. Such an increase in the price of silver will of necessity bring profits to private holders of silver, which profits will accrue through governmental action in the effectuation of a monetary policy for the entire country. It would be inequitable for a part of our people to take advantage of governmental action designed to benefit the country as a whole so as to reap large personal profits. The measure accordingly contains two safeguards. It provides that the Secretary of the Treasury may not pay more than 50 cents an ounce for any silver situated in the United States on May 1, 1934. It establishes a transfer tax of 50 percent of the profits arising out of the holding of silver or contracts for silver. Holders of silver are thus allowed a profit which should at least equal any profits arising from investments in silver or the purchase and sale of silver for industrial use during times when the price is not being increased by governmental action. The tax being in the nature of a profits tax covers transactions taking place prior to enactment. Were this provision not included in the bill, the policy of equitably reimbursing the Government for the increase which its action may bring to the price of silver could be easily obstructed."

dent was authorized to fix the weight of gold and silver dollars and the ratio between the two. In July, 1933, the London Silver Agreement (48 Stat. 1879, 1889), designed among other things to aid in controlling the world price of silver, was signed by delegates representing the principal silver-producing and silver using nations, including the United States. In December, 1933, by presidential proclamation (48 Stat. 1723) designed to carry out the terms of the London Agreement, the Federal mints were authorized to receive newly mined domestic silver for coinage.

On January 15, 1934 in recommending the enactment of the bill which became the Gold Reserve Act of 1934 (48 Stat. 337) the President stressed the importance of silver to the nation's monetary structure and, although withholding specific recommendations relating to silver until after the effects of the London Agreement and related measures became more apparent, envisaged a marked increase in our use of silver as a basis for currency (78 Cong. Rec. 643–644). Various bills providing for the acquisition of silver were before Congress in the ensuing months.[3] On May 22, 1934 the Pres-

[3] See, e. g., S. 3039, 3470, and 3658; H. Res. 293, 294, 303, and 339; H. R. 1577, 6158, 6485, 6854, 7320, 7475, 7581, 7832, 8054, 9242, and 9745, all of the 73d Congress, 2d session. H. R. 7581, providing for the exchange of agricultural surplus for silver bullion at a valuation up to 25 per cent above the world price, was passed by the House of Representatives on March 19, 1934 by a large majority. 78 Cong. Rec. 4863.

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ident recommended (78 Cong. Rec. 9209) the enactment of the measure which on June 19, 1934 became the Silver Purchase Act of 1934.

This message expressly recommended "a tax of at least 50 per cent on the profits accruing from dealing in silver." Manifestly, such a tax would serve as a limiting factor preventing undue rises in the price of silver due to speculative activity in anticipation of the recommended governmental acquisitions. Furthermore, as Congress expressly recognized (*supra*, p. 6, note), such a tax tended to reduce the governmental expense, by "equitably reimbursing the Government", for any increase in the price of silver to be acquired by the Government, which the silver program would entail. The efficacy of these incidents of the monetary program with respect to silver could undoubtedly have been "easily obstructed" (*supra*, p. 6, note) had the retroactive provisions not been made applicable at least to such transactions, as here, occurring after the Presidential message.

No discussion of the scope of the monetary powers of Congress is necessary here. The subject has been before this Court in notable recent decisions. See *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330. In *Norman* v. *B. & O. R. Co.*, *supra*, this Court made this significant statement after dwelling upon the power of

Congress in relation to the currency of the nation (p. 304):

> Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310.

There it was further said (p. 311), referring to the judicial function in relation to the exercise of the monetary policy of Congress, "We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

The case of *Veazie Bank* v. *Fenno,* 8 Wall. 533, cited with approval in the *Norman* case, was followed in *National Bank* v. *United States,* 101 U. S. 1, in which it was said (p. 6) with relation to a tax upon banks paying out notes of municipalities: "The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

The end in view was plainly legitimate and, we submit, that the means adopted was not so arbitrary or capricious as to violate the Fifth Amendment. The reasonableness of the taxing provisions—both the prospective and the retroactive

provisions—as aiding the achievement of the Congressional monetary policy seems apparent. The further purposes of safeguarding the Government against speculative profiteering at its expense and against tax evasion (See *Milliken* v. *United States, supra,* pp. 23, 24), as well as of equalizing the effects of the monetary program upon all citizens, furnish independent grounds for justifying the legislation here assailed.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

STANLEY REED,
*Solicitor General.*

JUNE 1936.

# APPENDIX

Treasury Regulations 85:

ART. 70. Returns.—Every person who on or after May 15, 1934, and before the enactment of the Silver Purchase Act of 1934 made any transfer of any interest in silver bullion shall, on or before July 18, 1934, file with the collector for the district in which is located his principal place of business (or, if none, his residence) or if he has no principal place of business or residence in the United States, with the collector at Baltimore, Md., a return in duplicate under oath on form 4 (silver) showing all such transfers and the following facts with respect to each:

(a) Date of the transfer.

(b) Name and address of transferee (except in the case of a futures contract liquidated by an offsetting futures contract).

(c) The interest in silver bullion transferred or to be transferred.

(d) The price for which such interest was or is to be transferred.

(e) The date and manner of acquisition (or production when that is the basic date).

(f) The cost of such interest (except as provided in art. 72). The facts upon which the cost is based shall be stated in detail.

(g) Whether or not the interest was acquired in a wash sale.

(h) The allowed expenses, if any.

(i) The tax, if any, on each transfer.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 11. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 4 percentum of the amount of the net income in excess of the credits against net income provided in section 25. (U. S. C., Title 26, Sec. 11.)

SEC. 21. "Net Income" means the gross income computed under section 22, less the deductions allowed by section 23. (U. S. C., Title 26, Sec. 21.)

SEC. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

* * * * *

Silver Purchase Act, c. 674, 48 Stat. 1178, 1179:

SEC. 8. Schedule A of title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. Silver, and so forth, Sales and Transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed ex-

penses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. Every such memorandum shall show the date thereof, the names and addresses of the transferor and transferee, the interest in silver bullion to which it refers, the price for which such interest is or is to be transferred and the cost thereof and the allowed expenses. Any person liable for payment of tax under this subdivision (or anyone who acts in the matter as agent or broker for any such person) who is a party to any such transfer, or who in pursuance of any such transfer delivers any silver bullion or interest therein, without a memorandum stating truly and completely the information herein required, or who delivers any such memorandum without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both. Stamps affixed under this subdivision shall be canceled (in lieu of the manner provided in section 804) by such officers and in such manner as regulations under this subdivision shall prescribe. Such officers shall cancel such stamps only if it appears that the proper tax is being paid, and when stamps with respect to any transfer are so canceled, the transferor and not the transferee shall be liable for any additional tax found due or penalty with respect to such transfer. The Commissioner shall abate or refund, in accordance with regulations issued hereunder,

such portion of any tax hereunder as he finds to be attributable to profits (1) realized in the course of the transferor's regular business of furnishing silver bullion for industrial, professional, or artistic use and (a) not resulting from a change in the market price of silver bullion, or (b) offset by contemporaneous losses incurred in transactions in interests in silver bullion determined, in accordance with such regulations, to have been specifically related hedging transactions; or (2) offset by contemporaneous losses attributable to changes in the market price of silver bullion and incurred in transactions in silver foreign exchange determined, in accordance with such regulations, to have been hedged specifically by the interest in silver bullion transferred. The provisions of this subdivision shall extend to all transfers in the United States of any interest in silver bullion, and to all such transfers outside the United States if either party thereto is a resident of the United States or is a citizen of the United States who has been a resident thereof within three months before the date of the transfer or if such silver bullion or interest therein is situated in the United States; and shall extend to transfers to the United States Government (the tax in such cases to be payable by the transferor), but shall not extend to transfers of silver bullion by deposit or delivery at a United States mint under proclamation by the President or in compliance with any Executive order issued pursuant to section 7 of the Silver Purchase Act of 1934. The tax under this subdivision on transfers enumerated in subdivision 4 shall be in addition to the tax under such subdivision. This subdivision shall apply (1) with re-

spect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply.

* * * * *

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# In the Supreme Court of the United States

OCTOBER TERM, 1936

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No. 97

THE UNITED STATES, PETITIONER

*v.*

PERCY K. HUDSON

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*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Court of Claims (R. 5) is reported in 12 F. Supp. 620. A supplemental opinion (R. 9) overruling the motion for new trial is reported in 13 F. Supp. 640.

### JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1935 (R. 9). The order overruling the motion for new trial was entered March 2, 1936 (R. 10). The petition for a writ of certiorari was filed June 2, 1936 (R. 10), and was granted October 12, 1936. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the application of the tax provided for in the Silver Purchase Act of 1934, enacted June 19, 1934, to transfers of interests in silver bullion consummated on May 23 and May 29, 1934, is valid and constitutional under the due process clause of the Fifth Amendment.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in Appendix A (*infra,* pp. 49–52).

## STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

On May 3, 1934, respondent purchased futures contracts for the delivery of 500,000 ounces of silver, of which he sold contracts for 350,000 ounces on May 23, 1934, and 150,000 ounces on May 29, 1934, at a profit of $8,621.96 (R. 4).

On July 30, 1934, respondent filed a silver tax return on the foregoing transactions pursuant to the provisions of the Silver Purchase Act of 1934 (*infra,* p. 49), approved June 19, 1934, and duly paid a tax in the amount of $4,311 on the profit realized on the foregoing transactions (R. 4–5).

On August 23, 1934, respondent filed claim for refund of the entire amount of tax so paid, which claim was duly rejected in full (R. 5).

Respondent brought suit in the Court of Claims on October 11, 1934 (R. 1), and on November 4,

1935, the Court of Claims, on the foregoing facts, found the respondent was entitled to recover in the amount of $4,311, the entire amount of the tax paid (R. 9).

## SUMMARY OF ARGUMENT

### I

The Silver Purchase Act of 1934, in authorizing and directing the Secretary of the Treasury to purchase silver until one-quarter of the monetary stocks of the United States consisted of silver, was an exercise of the monetary powers of the Congress. The Congress might well have considered that the retroactive imposition of the tax measured by profits derived from trading in silver was necessary fully to accomplish the purposes of the Act. The proposal to impose the tax retroactively had an unquestioned efficacy in curbing speculation, and thus insured: that the Treasury would not be forced to purchase silver at a speculatively increased price, that the market would not be subjected to a speculative upheaval, and that rejection of the proposed measure would not produce hardship. Since the retroactive tax served to implement the monetary policy, it falls within the well established doctrine permitting any reasonable measure required fully to effectuate the monetary policy.

The broad limits of the Fifth Amendment do not operate to invalidate this measure. The governmental necessity of purchasing a large amount of

silver in a highly sensitive market must be taken to outweigh the relatively slight burdens placed upon the speculator in silver transactions. Such is the practice of many legislatures throughout the world. This taxpayer bought in a period when his transactions were the equivalent of speculation upon the future action of the Government.

II

The tax in question is valid under the taxing power alone. Whatever its philosophical classification, so far as its retroactive effect is concerned it is the substantial equivalent of an income tax. Long continued Congressional policy, often sanctioned by this Court, permits an income tax to be imposed retroactively over a limited period of time. In the cases where this Court has held invalid a retroactive excise tax, the circumstances have been markedly different from those presented by this tax.

## ARGUMENT

### I

### THE TAX WAS A VALID EXERCISE OF THE MONETARY POWERS OF CONGRESS

#### 1. *The Silver Purchase Act as an Element of Monetary Policy*

The significance of silver in the monetary policy of the United States has been emphasized from the earliest days of our nation. As early as 1792

the bimetallic standard was established. (Act of April 2, 1792, c. 16, 1 Stat. 246, 248–249.) With the recurrent legislation relating to the role of silver in the monetary structure there is no present concern. It is sufficient that in the Act of November 1, 1893 (c. 8, 28 Stat. 4), it was provided:

> And it is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is hereby further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts. (31 U. S. C. 311.)

Notwithstanding this policy, by 1934 the silver stocks of the United States stood at the lowest point in its recent history. This appears from the following table supplied by the Treasury to the Ways and Means Committee in the hearings on H. R. 9745, May 25 and 26, 1934 (House Hearings, Silver Purchase Act, p. 32).

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*Percent of monetary stock of silver to total of monetary stock of gold and silver*

| | |
|---|---|
| June 30, 1890 | 40.3 |
| Sept. 30, 1893 | 54.9 |
| Sept. 30, 1895 | 55.8 |
| March 31, 1900 | 42.0 |
| June 30, 1900 | 41.9 |
| June 30, 1905 | 33.6 |
| June 30, 1910 | 30.9 |
| June 30, 1915 | 27.8 |
| June 30, 1920 | 16.2 |
| June 30, 1925 | 16.0 |
| June 30, 1930 | 16.0 |
| June 30, 1933 | 16.8 |
| April 30, 1934 | [1] 10.5 |

Outstanding recent events had foreshadowed action to remedy this unbalanced proportion. The more important of these may be summarized.

In Section 43 of the Agricultural Adjustment Act of May 12, 1933 (c. 25, 48 Stat. 31, 51), it was provided that the President should have authority to fix the weight of gold and silver dollars and the ratio between the two, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or, in case the Government of the United States entered into an agreement with other governments establishing the ratio between the value of gold and other currency, such ratio and parity were to be maintained.

In July 1933, at the Monetary and Economic Conference held in London, an agreement was entered into between delegates from the principal silver producing and using nations, including the

[1] The abrupt decline in 1933–34 is due to the revaluation of gold, increasing its monetary value.

United States, designed, among other things, to aid in stabilizing the world price of silver and in widening its monetary use. (48 Stat. 1879.)

On December 21, 1933, the President, by proclamation, directed the United States mints to receive for coinage any domestic silver mined after the date of the proclamation, on a basis yielding approximately 64½¢ an ounce. (48 Stat. 1723.)

On January 15, 1934, the President, in his message to Congress recommending passage of the bill which became the Gold Reserve Act of 1934 (c. 6, 48 Stat. 337), expounded the agreements undertaken at the London conference and the importance of silver in our monetary structure, in contemplation of a marked increase in our use of silver as a basis for currency. (Cong. Record, Vol. 78, pp. 643–644.)

On April 24, 1934, the agreement of the silver countries entered into in July 1933 became effective by ratification of the other nations. (48 Stat. 1879, 1889.)

Between January and May 1934, numerous bills providing for the acquisition of silver were presented in the Senate and House of Representatives. (S. 3039, 3470, 3658; H. Res. 293, 294, 303, 339; H. R. 1577, 6158, 6483, 6854, 7320, 7475, 7581, 7832, 8054, 9242, 9745.) The Dies bill (H. R. 7581), providing for the sale of American agricultural surplus products at the world market price, and accepting in payment therefor silver bullion

at a value up to 25% above the world market price of silver, was passed by the House on March 19, 1934, by a large majority. (Cong. Record, Vol. 78, p. 4863.) During this time there was strong pressure in Congress for legislation requiring the purchase of silver by the Government. These were not merely sporadic demands, but were so persistent and regular as to support a reasonable belief that legislation would be enacted. During this period the Treasury was already buying silver for monetary purposes under the authority conferred in the previous legislation.[2]

Under these circumstances, the Silver Purchase Act of 1934 was enacted. Its purpose is set forth in Section 2 of the Act:

> It is hereby declared to be the policy of the United States that the proportion of silver to gold in the monetary stocks of the United States should be increased, with the ultimate objective of having and maintaining, one fourth of the monetary value of such stocks in silver.

Accordingly, the Secretary of the Treasury, was, in Section 3, "authorized and directed to purchase silver, at home or abroad," so long as the proportion of silver was less than one-quarter of the total monetary stock.

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[2] See the President's message recommending the silver legislation in which he stated—"We have since acquired other silver in the interest of stabilization of foreign exchange and the development of a broader metallic base for our currency."

It is unnecessary to elaborate the purposes to be accomplished by this Act, whether they relate to the stability afforded the monetary structure, to the stimulus given to our foreign trade by purchases of silver abroad, or to the military or diplomatic advantages offered through possession of a large store of silver. It is sufficient that the basic purpose, to increase the silver in the monetary stocks, was one peculiarly within the Congressional province and one which it has unquestioned power to accomplish.

### 2. *The Retroactive Tax was Necessary to Accomplish the Purpose of the Act*

It is unnecessary in this case to consider the tax as imposed upon transactions completed after the enactment of the Silver Purchase Act. Respondent at no stage of this litigation has questioned the obvious power of Congress to implement its monetary policy by such a tax.

The Government submits that the purposes of the Silver Purchase Act could not be accomplished, save with unwarranted difficulty, without the imposition of the tax upon transactions completed shortly before its enactment. The basic question is whether Congress has power to protect itself from obstacles, which might otherwise approach the insuperable, arising from the open and deliberative character of its actions.

The legislative consideration of silver legislation had run throughout the entire session (see pp. 7–8,

*supra*). On May 22, 1934, the President sent a message to Congress devoted entirely to a discussion of the monetary policy of the United States. He suggested "we should move forward as rapidly as conditions permit in broadening the metallic base of our monetary system and in stabilizing the purchasing and debt-paying power of our money on a more equitable level." He called attention to previous Acts looking toward that purpose and recommended legislation to declare it to be "the policy of the United States to increase the amount of silver in our monetary stocks with the ultimate objective of having and maintaining one-fourth of their monetary value in silver and three-fourths in gold." He also said, "There should be a tax of at least 50 percent on the profits accruing from dealing in silver".

The purpose and design of the tax features of the legislation is set forth in unmistakable language in the report of the Ways and Means Committee of the House of Representatives on this bill (73d Cong., 2d Sess., Rep. No. 1801), as follows:

> By such acquisitions the price of silver and gold may also be brought into more proper adjustment. Such an increase in the price of silver will of necessity bring profits to private holders of silver, which profits will accrue through governmental action in the effectuation of a monetary policy for the entire country. It would be

> inequitable for a part of our people to take advantage of governmental action designed to benefit the country as a whole so as to reap large personal profits. The measure accordingly contains two safeguards. It provides that the Secretary of the Treasury may not pay more than 50 cents an ounce for any silver situated in the United States on May 1, 1934. It establishes a transfer tax of 50 per cent of the profits arising out of the holding of silver or contracts for silver. Holders of silver are thus allowed a profit which should at least equal any profits arising from investments in silver or the purchase and sale of silver for industrial use during times when the price is not being increased by governmental action. The tax being in the nature of a profits tax covers transactions taking place prior to enactment. Were this provision not included in the bill, the policy of equitably reimbursing the Government for the increase which its action may bring to the price of silver could be easily obstructed.

It is obvious from the history of the law, as well as from its provisions, that this tax would not have been enacted except as a part of a monetary measure which would inevitably result in increased profits which made taxation appropriate, and it is open to question whether the monetary policy would have been enacted apart from the tax. The Treasury advised the Ways and Means Committee that Section 8, the tax provision, was considered

"vital to the general plan and frame of the bill" (House Hearings, Silver Purchase Act, p. 25).

The considerations which demonstrate the desirability or necessity of the retroactive imposition of the tax are weighty. In the first place, the cost to the Treasury might prove prohibitive if speculation in silver was not curbed. The Secretary of the Treasury was "authorized *and directed*" to make silver purchases in very large volume (see p. 8, *supra*). The inevitable effect of the announcement of this policy by the President in his message to Congress and the consequent probability of its enactment into legislation would be to increase speculative activity and to force the market price upward. The result would be to insure that, by the time the Government was authorized to act, every acquisition would have to be made in a market already driven close to the highest price that could be paid by the Government.[3]

Second, Congress might well have felt it impossible to adopt the Silver Purchase Act if the result of its consideration of the measure would be to subject the silver markets to an upheaval of large

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[3] Section 3 provides that no purchase of silver situated within the continental United States on May 1, 1934, should be at a price in excess of 50 cents per ounce. This was almost 5 cents above the market price at the time of the President's message (see Appendix B, *infra*, p. 53). In addition speculative discounting of the possibility of nationalization of silver (Section 7), in which case at least the fair market value was to be paid, might well force the price even above this limit.

proportion. Not only silver producers and speculators, but a large and important segment of industrial activity is intimately concerned in the price of silver. A sudden advance in the price of silver, which would surely result were the speculative activity uncurbed, would prove embarrassing to all of these industrial users of silver and perhaps catastrophic to some of them. Another group which might well be as liable to disaster as the industrial user, in the event of a sudden rise in the price of silver, are the importers from Oriental markets. Any device which would stabilize the market during the period of Congressional deliberation may well, for this reason alone, have been considered indispensable to the enactment of the Act.

Third, it may often be that the retroactive imposition of a tax is necessary if Congress is to preserve its freedom of deliberation and of genuine consideration of the proposal. Without a curb on speculative price increases, a substantial proportion of the economic activities of the nation may frequently be dependent upon enactment of a proposed bill affecting a speculative market or other highly sensitized commercial situation. Industrial users and exporters and importers might well make commitments on the basis of a sudden price increase which would as abruptly sink back if the

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legislation were not in fact enacted. Investors and speculators would have heavy commitments which would be converted into catastrophic losses were the bill to die in Congress. These considerations could not fail to weigh with Congress as it considered the merits of such a bill. A proposed retroactive tax, in curbing the speculative price increase, could not fail to insure to Congress a greater freedom to accept or to reject as it thought best, and could not fail to insure the industrial and commercial activities of the nation from an important injury which might otherwise arise from the mere fact of legislative deliberation.

Finally, it should be noted that each of these considerations is equally applicable to the converse situation. Should the monetary situation become such as to make desirable legislation providing for the sale by the United States of its silver stocks, it is plain that a Presidential message recommending such legislation would, unless speculative activity were curbed during the period of its consideration, produce a disastrous decline on the silver market. The volume of sales, augmented by short selling, might be such as to destroy the market. This would be no less unsettling than the situation which Congress sought to avoid by the retroactive tax in question.

The Government may have occasion in the future to deal with monetary problems having enor-

mous consequences in both the domestic and international fields. The Congress, alone of the legislative bodies in all the great countries of the world, should not be denied the power adequately to protect its deliberations.

Congress, in considering the means by which to curb speculative activity and maintain an orderly market for silver, chose a tax of 50 per cent of the net profit arising from speculative transactions in silver, retroactive to May 15. The financial records of the period demonstrate, beyond the possibility of argument, that the method was effective.

The weeks of May 15 and May 21 were weeks of large transactions in silver futures, each week recording sales of about 20 million ounces, or from one-thirteenth to one-eighth of the estimated free silver supply in the United States. (See Appendix B, *infra*, p. 53.)

On May 22, the President's message was delivered and the bill was introduced in the Senate without the tax provision. This was omitted on the theory that the tax provision should originate in the House (House Hearings, Silver Purchase Act, p. 67). The day's sales were 7,500,000 ounces, and the following day 6,275,000 ounces. On this day (May 23) the House bill was introduced containing the tax proposal. The following day sales

immediately settled down again to 1,875,000 ounces and remained thereafter at the lower rate. During the remainder of the period prior to enactment of the measure, trading continued in moderate volumes, at no time exceeding 8,250,000 ounces per week.

The evidence that the proposal of a retroactive tax was effective to accomplish its purposes is equally clear when the price movements are examined. On the day the President's message was delivered, May 22, silver stood at 45.51. In spite of the announced purposes of the Act, the price was only 45.59 when the bill became a law on June 19. At no time had it risen above 46.06 or sunk below 44.92, a range of but slightly more than half a cent above or below the figure on May 22. (See Appendix B, *infra*, p. 53.)

The comments of the financial journals of that period make it plain that the tax feature was the operative cause of this condition.[4] For example, the *Journal of Commerce*, on May 26, 1934, states (p. 9):

> It is plainly evident that the determination of the Administration to tax profits on silver speculation 50 per cent is killing trade in silver futures. * * *
>
> * * * This lack of price fluctuation makes for a low trading volume.

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[4] See *The Annalist*, May 25, 1934, p. 815; June 1, 1934, p. 852; *Journal of Commerce*, May 23, 1934, p. 1; May 28, 1934, p. 17.

The absence of wide fluctuations in the world price of silver is proof that the Court of Claims erred in concluding that the Congress could not effectively curb speculation by means of a retroactive tax merely because "the United States produces only a comparatively small portion of the world's stock of silver." (R. 6.) Furthermore, through the exercise of the undoubted power to embargo the exportation of silver together with the imposition of the tax, Congress could control speculation in the large stocks of silver existing in this country regardless of the extent of speculation by foreigners with respect to silver held abroad. The conclusion of the Court of Claims would require the Government to sacrifice its control of the domestic market, one of the most important in the world, merely because it could not achieve world-wide control.

It is important, from the standpoint of orderly governmental procedure, to observe that the recent devaluation of the franc in an orderly fashion was facilitated by means of a provision substantially equivalent to that now under question. The French Monetary Law of October 1, 1936,[5] provides for a tax comparable to the one involved in the present case. Article XIV imposes a special tax of 50% on the net profits arising from "liquida-

[5] Published on page 1040 of the Journal Officiel of October 2, 1936.

tion accounts of forward operations entered into between September 21 and September 26 on French security markets." "Operations corresponding to duly justified commercial requirements will be exempt from this tax." This statute thus imposes a retroactive tax equal to 50% of the profits of persons who, during the week prior to the suspension of the gold standard by France and prior to the convening of the French Parliament for the consideration of monetary legislation, speculated in securities in anticipation of their value increasing as a result of the expected devaluation of the franc. In France, just as in the case at bar, it was deemed reasonable to take away from the speculator at least 50% of the profits he obtained as a result of the Government's monetary program.

Canada, by an act approved June 28, 1934, required the deposit with the Canadian Mint of gold produced in Canada and imposed a tax of 25% on the difference between the price of $20.67 per ounce and the world price of gold. Certain classes of gold were allowed to be exported, but were subject to the same tax. The tax was made retroactive to April 19, 1934, the date the bill was introduced. (Statutes of Canada, 1934, 24–25 George V. pp. 481–483.) Since the increased value of gold produced in Canada resulted from the depreciation of the Canadian dollar, the tax sought to allocate to

the government a portion of this profit and sought also to prevent persons from escaping the tax by disposing of their gold while the measure was being considered by the Canadian Parliament. Similarly, the Indian excise tax upon silver production, passed on April 4, 1930 (Act XVIII of 1930, Indian Trade Journal, Vol. 97, No. 1242, p. 74), was made retroactive to March 17, 1930, when the bill was introduced. (See *The Silver Market,* U. S. Dept. Commerce Trade Promotion Series No. 139 (1932), pp. 43–44.) The retroactive feature was directed toward limiting speculation and preventing a speculative profit at public expense. (See *Wall Street Journal,* March 26, 1930.)

It has, we feel, been demonstrated that the retroactive tax was necessary if Congress were to have full freedom to consider and to enact the Silver Purchase Act, an important element in its monetary policy. At least since the *Gold Clause* cases, *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States,* 294 U. S. 317; *Perry* v. *United States,* 294 U. S. 330, there can be no question but that it necessarily follows that Congress had power to impose the tax.

(1) It was within the competence of Congress to determine whether the speculation in silver futures within the period of about a month preceding

the enactment of the Silver Purchase Act constituted an obstruction to the exercise of its monetary power. The Court in the *Norman* case, as to gold clauses in private contracts, said (p. 311):

> Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. * * *

(2) Those who make contracts with reference to monetary metal are dealing subject to "those limitations which public policy may require." From the opinion in the *Norman* case we quote (p. 304):

> Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310. Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value.

(3) In the exercise of its money power Congress may prohibit and invalidate contracts, although previously made and valid when made, when they

interfere with the accomplishment of a policy it is free to adopt. In the language of the Chief Justice (p. 308) the contracts for gold payment "have a congenital infirmity." If contracts for future delivery of gold in payment of an obligation have a congenital defect which may wholly defeat performance, it is hard to see how a silver futures contract may escape a similar congenital defect sufficient to sustain retroactive taxation over a limited period of 50% of the profit. If those who acquired gold or obligations payable in gold may, as a result of the exercise of the monetary power, have taken away from them the entire increase in value resulting from the devaluation of the dollar, it is difficult to see upon what basis it can be contended that those who make contracts with respect to silver may not in the analogous situation be expected to give up half of their profits.

As the result of the regulation of gold and foreign exchange there was, beginning with March, 1933, no free market for gold in this country, and, while the price of gold in the foreign free markets was rising against the dollar, those markets were closed to Americans. Congress recognized that fairness to all of our citizens required that no speculator or hoarder should make any profits on gold. The effect was the same as if a profits tax of 100 per cent had been imposed on gold and, so far as the obligee is concerned, on gold clause obligations. Because silver is used industrially much more widely than gold, it was not desirable to subject

dealings in silver to as stringent regulations as gold. The tax imposed by the Silver Purchase Act made it possible to avoid constant regulating and licensing of silver transactions, and yet to curb speculation and reserve to the nation a substantial portion of the profits on silver which resulted from the Government's monetary action. (Hearings, H. R. 9745 on Silver Purchase Act of 1934, p. 64.)

The use of the taxing power, at least incidentally, as a defense and shield for the Government, and as an implement for the enforcement of its currency power, is an ancient device fully sustained by the decisions of this Court. The leading case is that of *Veazie Bank* v. *Fenno*, 8 Wall. 533, cited with approval in the recent *Norman* case, *supra*. In the *Veazie Bank* case, there was considered a tax of 10 per cent upon circulating notes of state banks. It was apparent that the tax was prohibitive in purpose and in effect, and that it was intended to deprive state banks of the valuable circulation privileges granted them under the laws of the several States. At page 549 of the decision, after noting that the courts could not prescribe limitations upon the exercise by the legislature of acknowledged powers, and discussing the scope of the monetary powers of Congress, this Court said, in part, "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the

whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation." The *Veazie Bank* case was followed in *National Bank* v. *United States,* 101 U. S. 1, in which this Court sustained a similar tax upon banks paying out notes of cities, towns and municipalities. It was their argument that the tax was intended to destroy such use of such notes, and this Court said at page 6, "The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

This Court held, in the *Veazie Bank* and *National Bank* cases, as recognized in the *Norman* case, *supra,* that in the exercise of its monetary power Congress had the right to put an end to all obstructions to the exercise and effectiveness of its money power. It would seem to follow that the tax imposed by the Silver Purchase Act of 1934 cannot be questioned. By that Act, Congress was legislating with relation to the currency of the whole country, and there can be no doubt that Congress was well within its rights in determining that means should be taken to curb speculation, not only from the time of enactment of the law, but from an earlier date approximating that when the proposed legislation was first made public. Whether the transactions here involved be termed investments, or speculations, or mere trades for profit, there is no possible doubt that they were precisely of the

sort which sought to make a profit at the expense of the monetary policy of Congress, or that the cumulative effect of such transactions would be to unsettle the market and greatly to increase the cost of silver to the Government.

### 3. *The Due Process Clause Does Not Invalidate This Tax*

The Government recognizes that, even though adopted to make its monetary measures effective, the retroactive tax is subject to the limitations of the Fifth Amendment. The scope of review which resides in the courts has recently been defined in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 311:

> We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final.

We are here dealing with one of the broadest, most delicate and most essential of governmental powers. It is one which in its nature should not be limited except for most imperative reasons. The scope of the money power was thus described by this Court in the *Norman* case (p. 303):

> The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, Sec. 8, Par. 5. But the Court in the legal tender cases did not derive from that express grant

> alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *McCulloch* v. *Maryland,* 4 Wheat. 316, 404–407; *Knox* v. *Lee, supra,* pp. 532, 536; *Juilliard* v. *Greenman, supra,* p. 438. The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard* v. *Greenman, supra,* pp. 439, 440.

In speaking of a tax of 72% on the last increment of income and a tax of 50% upon the taxpayer's whole income, which rested solely upon the taxing power of Congress and was alleged to be confiscatory, Judge Learned Hand, in *Towne* v. *M'Elligott,* 274 Fed. 960, 962 (S. D. N. Y.), said:

> It is true that these powers are limited, and that those limits must be observed, however little they circumscribe the analogous

> powers of other Legislatures. Yet when the question is of the interpretation of those broad counsels of moderation contained in the Fifth Amendment, we must interpret the limitations themselves with an eye to the practices which have become tolerated elsewhere among civilized nations. Were it not so, we should be limited forever to the political usages of 1789, and those amendments which were intended to protect the individual against extravagant or invidious discrimination would become a strait-jacket upon the nation's freedom.

In the Court's inquiry whether the retroactive silver tax has "a reasonable relation to a legitimate end" and whether the "broad counsels of moderation contained in the Fifth Amendment" have been observed, the situations both of the taxpayers and of the Government must be considered. The appraisal of their respective positions will show that the private right has been subordinated to the public policy not arbitrarily or capriciously but wisely and with insignificant private hurt compared with the vital necessities of the Government.

Under the Silver Purchase Act the United States was to become a purchaser of a great amount of silver, which might reach the approximate figure of 1,300,000,000 ounces of silver. Estimates placed the amount of free silver in the United States at that time as at from 150,000,000 to 250,000,000 ounces. The Government, therefore, was to be-

come a potential purchaser of an amount of silver greatly exceeding that available in this country (Hearings, H. R. 9745 on Silver Purchase Act of 1934, p. 64).

The Government could not enter the market as would a prudent buyer urged by such a necessity. The silver purchase policy of Congress was necessarily heralded to the world by the processes of formulating the legislation. The Government, accordingly, was in the position of bargaining with speculators who would know its position in advance.

As is developed below, other leading countries may resort to retroactive taxation in defense of their own policies. A denial of the right of the United States in the regulation of its currency to stand on a parity of power with those nations of the world with whose currencies our own is in a position of competition or interdependence would be a sacrifice of the national welfare in the interest of the few who are silver speculators.

It is desirable to prevent persons from profiting as a result of their speculating on action contemplated by a branch of the Government unable to keep its decisions from the public until they have been fully considered and are ready to be put into final effect. The decision to take legislative action, especially in democracies, is made in full view of the public. Messages from the Chief Executive, Committee hearings, debates and delib-

erations in the legislative body are ordinarily immediately reported to the press and made available to the public.

In order to protect the revenues and in order to eliminate, so far as possible, such speculation for private gain as is made possible by the publicity ordinarily attendant upon legislative proceedings, legislatures throughout the world have, as a normal part of their machinery, made use of their power to enact legislation retroactive to the date of the first public notice of the proposed action. The legislation was summarized by Mr. Justice Brandeis in his dissenting opinion in *Untermyer* v. *Anderson,* 276 U. S. 440 (pp. 451–452):

> The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of makings customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means. A similar practice prevails in Ireland, in all the self-governing Dominions, and to some extent in France and Italy. In the United States, retroactive operation of the tariff has been repeatedly recommended by the

> Tariff Commission and by the Secretary of Commerce. Legislation to that end was reported by the Committee on Ways and Means of the House of Representatives. No suggestion seems to have been made that such legislation would by its retroactive feature violate the due process clause.

In addition to the legislation referred to in this opinion, and that mentioned above (*supra,* pp. 17–19), an examination of the Interim Legislation Report of the Tariff Commission, referred to by Justice Brandeis, indicates that Article 35 of the Swiss Customs Law of June 28, 1893 provides that the Federal Council may increase rates of duty, such increase to be subject to subsequent approving legislation. The practice in that country is discussed in Exhibit VI to the above report, which also indicates that Germany, under Article 10 of its customs law of December 25, 1902, Italy under its law of 1883, and Sweden, under Article 60 of its constitution of 1809, followed similar procedures. The report also indicates that the French law of December 13, 1897 provided that bills raising import duties should be put into immediate effect by governmental decree and that if the bills providing for such increase should subsequently fail of passage, taxes collected during the interim were to be refunded accordingly. Article 34 of the French customs law of December 17, 1814, contained similar provisions. (See Exhibit VI A to above report.)

The Executive and Judicial branches of the Government have power to keep secret their deliberations when disclosure prior to decision would be prejudicial. The power to legislate retroactively for this interim period is a compensating power necessarily possessed by legislatures in order that they may act no less effectively. It would be unreasonable that any branch of the Government should, because of the fact that its proceedings are public, be deprived of the power to insure to the nation as a whole that certain classes of persons will not be permitted to speculate for private profit at the public expense. No language of the Constitution requires that this power be denied to the Congress in this instance.

Such were the necessities of the Government. It is submitted that the burden consequently placed on the taxpayer was, in comparison, relatively slight. The following tables relate in point of time, the transactions of respondent to those of the Government:

*1933:*

May 12—Thomas Amendment authorizes unlimited coinage of silver and fixing its ratio to gold.

July—Agreement by London Conference reached.

Dec. 21—President authorizes mints to receive silver on basis of 64½ cents per ounce.

*1934:*

Jan. 15—President's message recommending Gold Reserve Bill.

Apr. 24—London agreement between nations on silver became effective.

*May 3—Respondent purchased silver futures in question.*

May 15—Date retroactive tax effective.

May 22—President's message respecting the acquisition of silver and the imposition of a 50% profits tax. Bill introduced in Senate.

*May 23*—Bill containing retroactive tax feature introduced in House. *Respondent sold part of silver futures.*

May 28—Reported favorably by Ways and Means Committee.

*May 29—Respondent sold remainder of silver futures.*

May 31—Passed House.

June 11—Passed Senate.

June 13—Conference agreement on amendments.

June 19—Approved by President and became law.

The transactions of the taxpayer were entered into long after the price movements on the silver market were largely shaped by government purchases and by speculative conjectures as to governmental action. In purchasing silver futures, for delivery in September, a time after the Act was approved, the taxpayer was in effect speculating on the future developments in the Government's monetary policy. When he closed the transaction by sale of his futures, he was fully aware of the probable passage of the Silver Purchase Act and took the

profit which resulted in large part from the market's prediction of this action. All of his sales were made on or after the day when the House bill, containing the proposal for a retroactive tax, had been introduced. In such a situation the taxpayer hardly has been ill-treated by a tax, retroactive to May 15, which is imposed on the net income from his silver transactions, which were essentially the equivalent of speculating upon the future action of the Government.

It must be borne in mind that, save as there may be a profit due to the mere holding of the silver, there is no retroactive tax placed upon those who by their enterprise or skill produce silver from the mine or who employ it for fabrication or industrial use. Even a transaction in futures is not taxable where it constitutes a hedge by those whose industrial or commercial contracts require them to take a position in the silver market. It is only the speculative profit from the change in the market value of silver which is taxed.

When, under these situations, those who advantage by the Government's financial policies are required to surrender 50% of their profits it can hardly be said that counsels of moderation have failed to prevail. The taxpayer has no vested right in speculative operations in monetary metals against the interests of the sovereign. He has no constitutional right to dig himself into a sheltered position by acting while the sovereign is obliged to deliberate. He should not be permitted to force

the Congress into a position where it would be obliged to rush its deliberations on money policy in order to get into the market ahead of speculators. The Government should be able to protect its period of deliberation against impulsive action by itself or prejudicial action by others in a speculative market of great volatility. None should be permitted to destroy the effectiveness of the monetary power by anticipating its exercise. The Fifth Amendment was not intended to withdraw from the legislature the power to protect its deliberations. Our view of the Fifth Amendment is expressed in language borrowed from Judge Learned Hand in *Cohan* v. *Commissioner*, 39 F. (2d) 540, 545 (C. C. A. 2d):

> * * * limitations like the Fifth Amendment are not like sailing rules, or traffic ordinances; they do not circumscribe the action of Congress by metes and bounds. Rather they are admonitions of fair dealing, whose disregard the courts will correct, if extreme and glaring. Custom counts for much in such matters, and consistency for little; men cannot hope to fit their doings in advance to a pattern which will be sure to endure. The most they can expect is that courts will intervene when the defeat of their expectations passes any measure that reasonable persons could think tolerable, and even their grievance must be fairly outside the zone of possible debate.
>
> So it does not seem to us that the situation here calls for so heroic a remedy as to declare the statute unconstitutional, * * *

In this view of the case, *Untermyer* v. *Anderson,* 276 U. S. 440, has no bearing. This Court was there considering a novel tax, the gift tax, which was imposed with retroactive effect. It was not necessary to the policy of the Act that it be imposed retroactively; the Government would lose nothing but a certain amount of revenue were it confined to a prospective operation. The retroactive tax now under consideration, on the contrary, has been shown to be one which might well have been considered by Congress to be an indispensable feature of its monetary policy. It is submitted, therefore, that the retroactive application of the tax cannot be characterized as either arbitrary or capricious.

An analogous situation was presented in the *Head Money Cases,* 112 U. S. 580. This Court held that the "headmoney" demanded of shipowners was not strictly speaking a tax or duty within the meaning of the Constitution and did not go to the general support of the Government but constituted, rather, a fund raised from those engaged in transportation of passengers for the temporary care of passengers in need. The Court stated (p. 596):

> We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business.

The Court further held (p. 596):

> If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. *It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.* [Italics supplied.]

This language referred to the limitation on the taxing power as to uniformity, which is found in the Constitution itself. If, however, the express limitations of the taxing power do not apply to the money power, it follows that limitations laid down by the courts upon the taxing power, considered solely as such, do not apply when taxation is a device used in aid of the money power rather than simply for its own sake. For these reasons we do not consider that the tax cases, discussed at a later point, operate as limitations on this tax, whatever their effect might be if this tax were to be justified only as a revenue measure.

## II

### A TAX OF THIS NATURE MAY BE RETROACTIVELY APPLIED UNDER THE TAXING POWER WITHOUT VIOLATION OF THE FIFTH AMENDMENT

A recurrent governmental problem is that of protecting the public revenues from losses which would otherwise occur during the period that revenue legislation is pending. In foreign nations this problem is frequently solved by the retroactive imposition of the tax to cover a limited period prior to its enactment (see pp. 28–29, *supra*). In the United States, as will be developed below, such a practice is of unquestioned validity as applied to certain types of taxes, notably income taxes.

The subject of retroactive taxation under the Silver Purchase Act of 1934, enacted on June 19, 1934 (*infra,* p. 49), is profits resulting from transactions in silver on and after May 15, 1934. The profits to which the tax in this case is applied are derived from sales of future interests in silver made by the taxpayer on May 23 and 29, 1934, less than one month prior to the date of enactment. The silver futures so sold were acquired on May 3, 1934. The Court of Claims in its original opinion referred to the Act as "making the tax apply to purchases made prior to the enactment of the statute" and in discussing the reasonableness of the Act said that "after he had made the purchase his status was fixed and he was caught by a taxing statute which he had no reason to anticipate" (R. 8), and the court further said, "The act which

caused the tax to be applied was the act of purchase. We are of the opinion that the case clearly comes under the rule as stated in *Milliken* v. *United States,* supra, in that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time he made the purchases and we are therefore constrained to hold that the tax was invalid."

Upon motion for new trial, the Government having called the attention of the court to this obvious error in interpreting the Act and the equally obvious error in constitutional doctrine that the taxing law connot be changed so that at the disposition of property a burden will be imposed that did not exist at the time of its acquisition, the Court of Claims filed a supplemental opinion in which it revoked this reasoning but adhered to its conclusion. (R. 9–10.)

The Court of Claims found the imposition of the tax, on the profit resulting from the transactions here involved, was invalid and unconstitutional and allowed respondent to recover solely because of the retroactive application of the tax, relying wholly on the decisions of this Court in *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; and *Milliken* v. *United States,* 283 U. S. 15. The Government submits that the doctrine of those cases cannot serve to invalidate a tax such as that here involved.

The nature of the tax perplexed the Court of Claims as appears from its supplemental opinion.

It said, "The tax now under consideration was also novel. It was neither an income tax nor an ordinary sales or excise tax. No such tax had been levied before in the United States nor so far as we can find, in any country." (R. 10.)

There is much confusion about the classification of taxes. Thus the respondent (Br. in Op. 3) contends that the silver tax is a stamp tax, not an income tax. The Court of Claims also treated the tax as a stamp tax. (R. 7.) It clearly held the view that a stamp tax could not be an income tax. We submit that its characterization as a stamp tax merely denotes the manner of its enforcement and in nowise classifies the tax involved. There are two general classes of taxes: (1) direct taxes, and (2) duties, imposts, and excises. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 557. The Federal income tax in some of its aspects is a direct tax and in other aspects it is an excise. *Willcuts* v. *Bunn*, 282 U. S. 216; *Morrissey* v. *Commissioner*, 296 U. S. 344. It is not a separate class of taxes. Neither do stamp taxes constitute a separate class of taxes. However, they usually fall into the class of excises. *Thomas* v. *United States*, 192 U. S. 363, 371. While excise taxes are commonly collected by means of stamps, we submit that the manner of collection does not serve to classify the tax as an excise, or to militate against its being an income tax. Moreover, in dealing with the tax for the period here involved, that prior to enactment,

the statute provides that it shall be collected in such manner as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and Treasury Regulations 85, Art. 70, *infra*, p. 51, provide that the taxpayer should make a return to the Collector and pay the tax, not by stamps but in the manner in which income taxes are commonly paid. Clearly, if the manner of collection is alone sufficient to classify this tax, it is an income tax for the period here involved.

Excises have been defined as "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley on Constitutional Limitations (7th Ed.), p. 680; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151. They "usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc." *Knowlton* v. *Moore*, 178 U. S. 41, 88.

Where, in respect of taxation, claim is made of violation of the due process clause, mere classification, terminology, or definition is not material. The determining factor is the practical effect of the operation of the tax. In *Nicol* v. *Ames*, 173 U. S. 509, this Court said (p. 515):

> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should

> be indulged in for the purpose of placing it in a category which would invalidate the tax. * * * Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, * * *.

See also *Burnet* v. *Wells,* 289 U. S. 670. Cf. *Shaffer* v. *Carter,* 252 U. S. 37; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

In its practical effect and operation the retroactive tax here in question was a tax upon the profit or income resulting from silver transactions. That income, like respondent's other income was subject to the usual income tax even though the Silver Purchase Act had never been passed. It is to be noted that not only were costs and certain expenses deductible, but during the retroactive period active traders in silver were in general permitted to offset trading losses against profits. Coll. Mim. 4211 and T. D. 4450, XIII–2 Cumulative Bulletin 539, 549. In view of the extensive powers of Congress with respect to the allowance of deductions (see *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103), it is immaterial whether the losses allowed are such as in all cases to meet with precision a philosophic definition of net income.

It is immaterial whether this tax would be classified as an income tax for all purposes. See *Flint*

v. *Stone-Tracy Co.*, 220 U. S. 107, 151; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, 284; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388. So far as its retroactive effect is concerned, it stands on precisely the same footing as an income tax. The tax is imposed only on net profits, which the taxpayer would welcome even though he had known in advance that a part of them would be taken by taxation. He has not entered upon a business transaction which, after the event, was made unprofitable by the unforeseen imposition of a tax. His complaint is not that the tax has retroactively changed his transaction into one showing a loss but only that it has taken a part of his profits. Foreknowledge of subsequent events, unless the taxpayer be so exceptional as to renounce the half loaf for desire of the whole, would not have altered his conduct in any particular. It is plain that, so far as its retroactive imposition is concerned, the tax imposed by the Silver Purchase Act has an effect differing in no manner from an income tax and must in this connection be viewed as such a tax.

From the time of the Civil War to the present there have been numerous Federal income-tax Acts, each of which has had retroactive application. Attacks upon the retroactive features of such Acts have uniformly failed. As early as the case of *Stockdale* v. *Insurance Companies*, 20 Wall. 323 (cited with approval in *Brushaber* v. *Union Pac.*

*R. R.*, 240 U. S. 1), in sustaining a provision in an income tax law assailed because of its retroactivity, this Court said (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

Likewise in *Lynch* v. *Hornby*, 247 U. S. 339, it was said with respect to an income tax act (pp. 343–344), "That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the Amendment was permissible is settled by *Brushaber* v. *Union Pac. R. R.*, 240 U. 1, 20". Again in *Cooper* v. *United States*, 280 U. S. 409, it was said (p. 411), "That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as a part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 399".

That Congress may single out particular classifications of income for special rates is established. See *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d), and *Updike* v. *United States*, 8 F. (2d) 913 (C. C. A. 8th), certiorari denied, 271 U. S.

661, holding that the high rate of tax on war profits was not violative of the Fifth Amendment and that the retroactive application of the excess-profits tax in the Act of October 3, 1917, to transactions occurring within the calendar year 1917, was not invalid. Cf. *Shaffer* v. *Carter, supra,* p. 58.

Even were the tax to be viewed as an excise tax, and even if it be ignored that the tax is imposed only on net profits, retroactivity alone does not render it invalid. The sales of future contracts were already subjected to a transfer tax under Subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. That an excise tax may be increased retroactively or have retroactive features is well settled. *Patton* v. *Brady,* 184 U. S. 608; *Billings* v. *United States,* 232 U. S. 261; *Hecht* v. *Malley,* 265 U. S. 144.

However the tax may be classified, its retroactive imposition is not arbitrary, unreasonable or capricious. It is clear that retroactivity is not enough to warrant this characterization. The nature of the tax, the circumstances surrounding its imposition, and the practical effect and result of the exaction, must all be considered when its validity is questioned. If after considering these factors the taxing act is shown to be so arbitrary and capricious and lacking in reasonableness as to constitute, not taxation, but confiscation, then intervention to prevent retention of the tax is justified.

The facts and circumstances surrounding the enactment of the Silver Purchase Act and the im-

position of the tax are such as to make it apparent that the retroactive application of the tax could not be considered to be arbitrary, capricious, or unreasonable. These circumstances have been reviewed in discussing the monetary powers of the Congress, and are equally applicable here.

Retroactivity, of itself and alone, does not render a tax unconstitutional. In this case respondent asserts such a claim under the authority of *Untermyer* v. *Anderson,* 276 U. S. 440. There it was held that a gift tax, imposed upon a gift consummated before the law imposing the tax was enacted, was invalid as a taking of property without due process of law. But the decision in the *Untermyer* case was not grounded on the mere fact of the retroactive application of the statute. This was clearly shown in *Milliken* v. *United States, supra,* where a retroactive tax statute was assailed, citing the *Untermyer* case, and this Court, in sustaining the tax in the *Milliken* case said (pp. 21–22):

> But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court. See *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Flint* v. *Stone Tracy Co.* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261,

282; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Hecht* v. *Malley*, 265 U. S. 144, 164; *Cooper* v. *United States*, 280 U. S. 409. See *Taft* v. *Bowers* [278 U. S. 470, 482]; *United States* v. *Heinzen*, 206 U. S. 370; *Graham* v. *Goodcell*, 282 U. S. 409.

The rule drawn by the Court of Claims from *Nichols* v. *Coolidge* and *Untermyer* v. *Anderson*, *supra*, "that if at the time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by a subsequent statute" (R. 6), is so far as applied to these circumstances in conflict with the principles applied and enunciated by this Court in *Cooper* v. *United States* and *Milliken* v. *United State*, *supra*.

Accordingly, we submit, this case is controlled by the decisions of this Court in *Cooper* v. *United States* and *Milliken* v. *United States*, *supra*, in both of which retroactive taxation was sustained. In the *Cooper* case, this Court declined to hold invalid an income tax on the "gains from prior but recent transactions" (p. 411). In the *Milliken* case, it was said (p. 23):

> Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his

> chances of any increase in the tax burden which might result from carrying out the established policy of taxation * * *.

Respondent knew that profits realized on his transfers would be subject to income taxation such as had been prevalent in this country since 1913. He also knew that not only the profits but also the transfers themselves were taxable in view of subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. Accordingly he had such warning, within the rule laid down in the *Milliken* case, that he justly may be regarded as taking his chances of retroactive application to him of a tax such as is involved in this case.

The instant case is readily distinguishable from *Nichols* v. *Coolidge*, 274 U. S. 531, and *Untermyer* v. *Anderson, supra*. As pointed out by this Court in *Cooper* v. *United States, supra* (p. 412), those cases "gave no consideration to the power of Congress to require that taxable income should *include profits from transactions consummated within the year.*" (Italics supplied.) In *Nichols* v. *Coolidge* the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer. Here the transfers were made less than one month before the law was passed. The *Untermyer* case concerned a gift tax imposed upon a gift made before the law was enacted. There is a material differ-

ence between retroactively taxing a gift and retroactively taxing the net gain from a business transaction. Mr. Untermyer would have been compelled to surrender an additional amount by way of taxes in consequence of having made a gift, tax free at the time, while the respondent here merely relinquished a part of his profit. Mr. Untermyer could well contend that he would not have parted with his property by gift had he known that subsequently he would have to pay a gift tax. The respondent here cannot say that he would not have chosen to realize a profit on his silver transactions had he known the profit was to be subsequently taxed.

The support for the tax, the past benefits, are much more apparent in the case of the gain than they are in the case of the gift. Especially is this the case when the profits themselves arise from speculation as to the Government's monetary policy. And it is settled that a tax may be imposed on past benefits. *Wagner* v. *Baltimore,* 239 U. S. 207; *Rafferty* v. *Smith Bell & Co.,* 257 U. S. 226; *Forbes Boat Line* v. *Comm'rs.,* 258 U. S. 338; *Graham & Foster* v. *Goodcell,* 282 U. S. 409.

## CONCLUSION

The retroactive imposition of the tax contained in the Silver Purchase Act has been shown to be necessary fully to implement the monetary powers of Congress. It has been shown to be a legitimate

means to a necessary end, and not to impose exceptional hardship upon the silver speculator. Apart from its function as a corollary of the monetary policy of Congress, the tax may be considered as a revenue measure alone. So viewed, its retroactive effect is precisely similar to that of an income tax, which Congress has unquestioned power to impose retroactively.

For these reasons it is respectfully submitted that the judgment of the Court of Claims should be reversed.

STANLEY REED,
*Solicitor General.*
ROBERT H. JACKSON,
*Assistant Attorney General.*
SEWALL KEY,
GEORGE H. FOSTER,
G. W. BILLINGS,
*Special Assistants to the Attorney General.*
WARNER W. GARDNER,
*Attorney.*

HERMAN OLIPHANT,
*General Counsel,*
BERNARD BERNSTEIN,
LOREN P. OAKES,
*Attorneys, Treasury Department.*

NOVEMBER, 1936.

## APPENDIX A

Silver Purchase Act of 1934, c. 674, 48 Stat. 1178, 1179:

SEC. 8. Schedule A of title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. Silver, and so forth, Sales and Transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. Every such memorandum shall show the date thereof, the names and addresses of the transferor and transferee, the interest in silver bullion to which it refers, the price for which such interest is or is to be transferred and the cost thereof and the allowed expenses. Any person liable for payment of tax under this subdivision (or anyone who acts in the matter as agent or broker for any such person) who is a party to any such transfer, or who in pursuance of any such transfer delivers any silver bullion or interest therein, without a memorandum stating truly and completely the information herein required, or who delivers any such memorandum without having the

proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both. Stamps affixed under this subdivision shall be canceled (in lieu of the manner provided in section 804) by such officers and in such manner as regulations under this subdivision shall prescribe. Such officers shall cancel such stamps only if it appears that the proper tax is being paid, and when stamps with respect to any transfer are so canceled, the transferor and not the transferee shall be liable for any additional tax found due or penalty with respect to such transfer. The Commissioner shall abate or refund, in accordance with regulations issued hereunder, such portion of any tax hereunder as he finds to be attributable to profits (1) realized in the course of the transferor's regular business of furnishing silver bullion for industrial, professional, or artistic use and (a) not resulting from a change in the market price of silver bullion, or (b) offset by contemporaneous losses incurred in transactions in interests in silver bullion determined, in accordance with such regulations, to have been specifically related hedging transactions; or (2) offset by contemporaneous losses attributable to changes in the market price of silver bullion and incurred in transactions in silver foreign exchange determined, in accordance with such regulations, to have been hedged specifically by the interest in silver bullion transferred. The provisions of this subdivision shall extend to all transfers in the United States of any interest in silver bullion, and to all such

transfers outside the United States if either party thereto is a resident of the United States or is a citizen of the United States who has been a resident thereof within three months before the date of the transfer or if such silver bullion or interest therein is situated in the United States; and shall extend to transfers to the United States Government (the tax in such cases to be payable by the transferor), but shall not extend to transfers of silver bullion by deposit or delivery at a United States mint under proclamation by the President or in compliance with any Executive order issued pursuant to section 7 of the Silver Purchase Act of 1934. The tax under this subdivision on transfers enumerated in subdivision 4 shall be in addition to the tax under such subdivision. This subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply."

* * * * *

Treasury Regulations 85:

ART. 70. *Returns.*—Every person who on or after May 15, 1934, and before the enactment of the Silver Purchase Act of 1934 made any transfer of any interest in silver bullion shall, on or before July 18, 1934, file with the collector for the district in which is

located his principal place of business (or, if none, his residence) or if he has no principal place of business or residence in the United States, with the collector at Baltimore, Md., a return in duplicate under oath on form 4 (silver) showing all such transfers and the following facts with respect to each:

(a) Date of the transfer.

(b) Name and address of transferee (except in the case of a futures contract liquidated by an offsetting futures contract).

(c) The interest in silver bullion transferred or to be transferred.

(d) The price for which such interest was or is to be transferred.

(e) The date and manner of acquisition (or production when that is the basic date).

(f) The cost of such interest (except as provided in art. 72). The facts upon which the cost is based shall be stated in detail.

(g) Whether or not the interest was acquired in a wash sale.

(h) The allowed expenses, if any.

(i) The tax, if any, on each transfer.

# APPENDIX B

## DEALINGS IN SILVER FUTURES ON THE NEW YORK COMMODITY EXCHANGE

### *May 15 to June 19, 1934*

Prepared by the Division of Research and Statistics, Treasury Department, on the basis of figures of the Commodity Exchange, released daily and also published in the New York Times and the Wall Street Journal.

| Date | Average Price | Volume |
|---|---|---|
| May 15 | 44.78 | 1,125,000 |
| May 16 | 44.43 | 5,200,000 |
| May 17 | 45.32 | 5,825,000 |
| May 18 | 45.35 | 5,925,000 |
| May 19 | 45.52 | 1,350,000 |
| Weekly Average | 45.08 | |
| Weekly Volume | | 19,425,000 |
| May 21 | 45.70 | 1,750,000 |
| May 22 | 45.51 | 7,500,000 |
| May 23 | 45.29 | 6,275,000 |
| May 24 | 45.07 | 1,875,000 |
| May 25 | 45.16 | 1,875,000 |
| May 26 | 45.19 | 850,000 |
| Weekly Average | 45.32 | |
| Weekly Volume | | 20,125,000 |
| May 28 | 45.22 | 925,000 |
| May 29 | 45.34 | 1,175,000 |
| May 30—Holiday | | |
| May 31 | 45.23 | 1,325,000 |
| June 1 | 45.02 | 1,500,000 |
| June 2 | 44.92 | 1,825,000 |
| Weekly Average | 45.15 | |
| Weekly Volume | | 6,450,000 |
| June 4 | 45.06 | 950,000 |
| June 5 | 45.14 | 900,000 |
| June 6 | 45.67 | 2,400,000 |
| June 7 | 45.59 | 1,725,000 |
| June 8 | 45.59 | 1,500,000 |
| June 9 | 45.68 | 775,000 |
| Weekly Average | 45.46 | |
| Weekly Volume | | 8,250,000 |
| June 11 | 45.47 | 1,175,000 |

| Date | Average Price | Volume |
|---|---|---|
| June 12 | 45.51 | 1,775,000 |
| June 13 | 46.06 | 3,050,000 |
| June 14 | 45.72 | 1,525,000 |
| June 15 | 45.36 | 350,000 |
| June 16 | 45.05 | 125,000 |
| Weekly Average | 45.53 | |
| Weekly Volume | | 8,000,000 |
| June 18 | 45.36 | 950,000 |
| June 19 | 45.59 | 3,000,000 |
| Average | 45.48 | |
| Volume | | 3,950,000 |

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1936

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DOCKET No. 97

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THE UNITED STATES, *Petitioner*

*vs.*

PERCY K. HUDSON

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

---

BERNHARD KNOLLENBERG,
*Counsel for Respondent.*

LORD, DAY & LORD,
HERBERT BROWNELL, JR.,
HARRY J. RUDICK,
*Of Counsel.*

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### Opinion Below.

The opinion of the Court of Claims (R. 5) is reported in 12 F. Supp. 620. Supplemental opinion (R. 9) denying motion for new trial is reported in 13 F. Supp. 640.

### Jurisdiction.

The judgment of the Court of Claims was entered on November 4, 1935. The order of the Court of Claims overruling the motion for a new trial was entered on March 2, 1936. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

### Statement of the Case.

The statement of the case contained in the petitioner's brief (pp. 2-3) is satisfactory to the respondent.

## Argument.

The respondent submits that the petition for a writ of certiorari should be denied for the reasons that: (1) the decision of the Court below was correct and (2) there is no conflict of decisions and the matter involved is not of outstanding public importance. These points will be discussed in the order named.

### 1. The decision of the Court below was correct.

The Court below held that the retroactive feature of the silver tax of 1934 was unconstitutional under the decisions of this Court in *Untermyer* v. *Anderson,* 276 U. S. 440, dealing with the retroactive Federal gift tax of 1924 and *Nichols* v. *Coolidge,* 274 U. S. 531, dealing with a retroactive provision of the 1918 Federal Estate Tax Law. Cf. *Helvering* v. *Helmholz,* 296 U. S. 93, dealing with a possibly retroactive provision of the 1926 Federal Estate Tax Law.

The Court below pointed out that this Court had said in *Milliken* v. *United States,* 283 U. S. 15, that the *Untermyer* and *Coolidge* cases established the principle that, where the nature and amount of the challenged tax burden could not have been understood and foreseen by the taxpayer at the time of the particular act which was made the occasion of the tax, the tax is so arbitrary as to constitute a denial of due process of law contrary to the Fifth Amendment of the Constitution of the United States, and that the tax challenged in the present case was a tax of that character.

The petitioner contends that the *Untermyer* and *Coolidge* decisions are not applicable to the present case on the grounds that: (a) the present tax is an income tax, and

the principle established by these decisions does not apply to income taxes; and (b) the retroactive tax in question was an exercise of Congress' power to regulate currency and is supportable as such; even though it might be unconstitutional if looked at primarily as a revenue measure.

The respondent's answers to these allegations are that (a) the silver tax is not an income tax; but, even if it were, its retroactive provision would be unconstitutional; and (b) in so far as the silver tax applied to transactions like the present, dealing with silver which had been purchased prior to the effective date of the tax, the tax was palpably a revenue, not a monetary, measure.

The grounds in support of these points will be discussed in the order named:

a. *The present tax is not an income tax, but even if it were, its retroactive provision would be unconstitutional.*

The grounds for the position that the silver tax is a stamp tax, not an income tax, are adequately stated by the Court below (R. 7), as follows:

> "the tax is specifically designated as a stamp tax, is paid by means of stamps, the Government itself has administered the act as a stamp tax, and a Treasury decision has been promulgated to the effect that the amount of this tax was deductible in determining the net income of the taxpayer."*

Conceding, however, for the sake of argument, that the silver profits tax is an income tax, it does not follow that the

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* The Treasury Decision referred to is *I. T. 2899*, June 1935 Cumulative Internal Revenue Bulletin, page 67, construing the provision of Section 23(c) of the 1934 Act permitting the deduction, in computing net taxable income, of "taxes paid or accrued within the taxable year, except—(1) Federal income, war-profits, and excess-profits taxes." This Decision holds that the silver tax is a stamp tax, not an income tax, and is, therefore, deductible.

retroactive application of this tax is constitutional. The decision of this Court in *Cooper* v. *United States,* 280 U. S. 409, in alleged support of a general rule that income taxes may be imposed retroactively, does not support so extensive a proposition. This Court did indeed hold that the particular retroactive feature of the Revenue Act of 1921, which was under consideration in the *Cooper* case, was constitutional; but this Court did not hold, nor, we believe, intend to hold, that retroactive income taxes, even if arbitrary or palpably unreasonable, would not violate the Fifth Amendment. This Court concluded its opinion in the *Cooper* case with the observation that it could find nothing "unusual, arbitrary or capricious" in the provision of the taxing act there involved. Accordingly, we believe that this Court, had it found such provision to be palpably unreasonable or arbitrary, would not have sustained its validity.

That the tax involved in the present case, if construed to be an income tax, as contended by the petitioner, would be palpably unreasonable and unjust is apparent from consideration of the following facts: In determining statutory net income, for the purpose of computing income tax under the Revenue Act of 1934, taxpayers are permitted to deduct from gross income, stamp taxes, but are not permitted to deduct income or excess profits taxes (Sec. 23(c) ). Consequently, in the case of a taxpayer like the respondent, having a statutory net income of over $100,000, the tax on the silver profits involved in the present case would total 106%—52% surtax, 4% normal tax and 50% silver profits tax. We believe that this Court would not hold valid such a worse than confiscatory tax.

b. *In so far as the silver profits tax applied to transactions like the present, dealing with silver which had been purchased prior to the effective date of the tax, the tax was palpably a revenue and not a monetary measure.*

The petitioner argues that the Silver Purchase Act was part of a unified program looking to the regulation of the currency of the nation and the development of its monetary system. This is conceded. It is also conceded that a tax on the profits from silver sales was an appropriate supplement to this program. This, however, does not establish the proposition that the *retroactive feature* of the tax was justified as an essential auxiliary to the Government's monetary policy. In the first place, it is highly improbable that the imposition or non-imposition of a tax amounting to approximately $400,000—this is the amount indicated by petitioner on page 4 of his brief to be involved in cases similar to the present one—would have any appreciable effect upon the monetary system of the country. In the second place, the President, in outlining the Government's monetary policy, did not recommend that the silver tax be made retroactive. The retroactive feature of the tax was initiated by Congress itself to "reimburse the Government for the increase which its action might bring to the price of silver".

The purpose of the Silver Tax Act was stated in the President's message as follows:

> "to increase the amount of silver in our monetary stocks with the ultimate objective of having and maintaining one-fourth of their monetary value in silver and three-fourths in gold." (78 Cong. Rec. 9209.)

In view of the President's policy (announced May 22, 1934) of having the United States gradually acquire silver,

the Government was, of course, desirous of curbing future competitive *buying* of silver by individual traders. It is obvious that the *selling of silver already owned* would aid, not interfere with, the President's announced policy of increasing the Government's stock of silver. But Congress did not limit the tax to profits on silver purchased subsequent to May 22 or even May 15. The tax applied regardless of the date of purchase. A tax on the profits from sales of silver already on hand was a revenue, not a monetary, measure.

All of the silver which the respondent sold was acquired by him prior to May 15, 1934 and was owned by him at the time the retroactive tax took effect. Consequently, if the retroactive feature of the tax had been devised as a monetary measure, rather than as a revenue raising measure, no tax would have been imposed on respondent's silver profits.

2. **The writ should be denied since there is no conflict of decisions and the matter involved is not of outstanding public importance.**

Petitioner urges that the decision of the court below is in conflict with principles enunciated by this Court in *Cooper* v. *United States,* 280 U. S. 409, and *Milliken* v. *United States,* 283 U. S. 15. However, both of these cases involved retroactive features of *income tax* legislation. As previously stated the present tax is not an income tax but an entirely novel and different tax. The case is, therefore, controlled by the principles set forth in the *Untermyer* and *Coolidge* cases, *supra,* which this Court distinguished from the *Cooper* and *Milliken* decisions in its respective opinions in the latter two cases.

The present case involves a principle which has already been passed upon by this Court in the *Untermyer* and *Coolidge* cases, to wit: the power of Congress to enact retroactive excise tax legislation of a novel character. As stated by the Court below, its conclusion can affect only a very few cases so far as the silver act is concerned; and, since the decision appealed from does not affect sales of silver made after the enactment of the law, the matter involved is not of outstanding public importance. The writ should, therefore, be denied.

## Conclusion.

We submit that the decision below is correct, that there is no conflict of authority, that the question is not one of outstanding public importance, and that the petition should be denied.

Respectfully submitted,

BERNHARD KNOLLENBERG,
*Counsel for Respondent.*

LORD, DAY & LORD,
HERBERT BROWNELL, JR.,
HARRY J. RUDICK,
*Of Counsel.*

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NOV 16 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1936

No. 97.

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

PERCY K. HUDSON,
*Respondent.*

## RESPONDENT'S BRIEF.

BERNHARD KNOLLENBERG,
*Counsel for Respondent,*
25 Broadway,
New York, N. Y.

GEORGE DE FOREST LORD,
*Of Counsel.*

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## RESPONDENT'S BRIEF.

### Introductory Statement.

This case is presented upon an agreed stipulation of facts. Respondent purchased certain futures contracts for the delivery of silver on May 3, 1934, and sold them at a profit May 23 and 29, 1934. There was no Federal law imposing any special tax on such transactions in force at the time. The Silver Purchase Act of 1934, which levied a tax of 50% of the profits accruing from transfers of interests in silver, was not passed until June 19, 1934.

The Act, however, contained a retroactive provision. It taxed profits on transfers of interests in silver made on and after *May 15, 1934.* Under this retroactive provision, respondent was assessed and paid a tax of $4,311.00. Respondent filed an adequate claim for refund with the Commissioner of Internal Revenue based on the ground

that the provision in the statute applying the tax to transactions, like the present, which were completed before the enactment of the statute, was unconstitutional; but his claim was rejected. He sues to recover the amount of the tax, with interest and costs. The Court of Claims, on November 4, 1935, found respondent entitled to recover the amount of tax he had theretofore paid.

## Statute Involved.

The statute involved is Sub-division 10 of Schedule A of Title VIII (the Stamp Tax Title) of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934. The statute is set forth in full in Appendix A of the Government's brief. The more pertinent provisions of the statute are as follows:

> "*Section 800 of the Revenue Act of 1926:*
>
> * * * there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned or shipped, the several taxes specified in such schedule. * * *
>
> 10. *Silver, and so forth, sales and transfers.*—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total cost thereof and allowed expenses, 50 per centum of the amount of such excess. * * *

> * * * This subdivision shall apply * * * (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply. * * *"

The Silver Purchase Act was enacted at 9 P. M. on June 19, 1934.

## Summary of Argument.

I.

Under the authority of *Untermyer* v. *Anderson,* 276 U. S. 440, Congress may not constitutionally (within the Fifth Amendment) levy an excise tax on the profits realized by the respondent on transfers which were made and completed prior to the date of enactment of the taxing Act.

II.

The Government's attempt to distinguish the *Untermyer* case is unsuccessful; (a) the retroactive application of the Silver Profits Tax is not supportable as a monetary measure; (b) the Silver Profits Tax is not the kind of tax on income which can be imposed retroactively.

## Argument.

### I.

**Under the authority of Untermyer v. Anderson, 276 U. S. 440, Congress may not constitutionally (within the Fifth Amendment) levy an excise tax on the profits realized by the respondent on transfers which were made and completed prior to the date of enactment of the taxing act.**

The retroactive tax levied against respondent in the instant case is unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution.

*Untermyer* v. *Anderson,* 276 U. S. 440 (1928).

The *Untermyer* case is decisive of the present case. The action was brought by the taxpayer to recover from the Collector of Internal Revenue the amount of a tax paid on gifts made by the taxpayer. The tax had been assessed pursuant to the gift tax provisions of the Revenue Act of 1924. The gifts in question were made on May 23, 1924, and the Revenue Act was enacted on June 2, 1924. No Federal Gift Tax was in effect prior to such day. The gift tax provisions had been introduced in Congress on February 25, 1924, and accordingly had been under consideration by the House and the Senate for almost three months when the gifts were made. In fact the final conference report of the two Houses, which provided for the gift tax, had been made at the time that the gifts were effected.

It had previously been held, in *Blodgett* v. *Holden,* 275 U. S. 142 (1927), modified 276 U. S. 594 (1928), that the gift tax provisions of the Revenue Act of 1924 were invalid under the due process clause of the Fifth Amendment in so far as they applied to a gift made in January, 1924, prior to the introduction of the gift tax provisions in Con-

gress. The *Blodgett* decision, however, left open the question of whether a gift made after the gift tax provisions were introduced in Congress, but before the Act was finally passed, could constitutionally be taxed. This was the question presented in the *Untermyer* case.

This Court held that the tax assessed in respect of the gifts made May 23, 1924 was invalid because it was so arbitrary that its enforcement would amount to a confiscation of property without due process of law within the inhibition of the Fifth Amendment to the Constitution of the United States.

The collector in the *Untermyer* case had argued that the need for revenue for the Federal Government was so great, and the power of Congress to raise revenue was so broad, that the retroactive gift tax should be upheld. This argument was rejected by the Court.

A second argument advanced by the collector was that Congress had power to establish a retroactive gift tax in order to prevent tax evasions. It was pointed out that one of the favorite methods of evading was to split up large incomes by gifts among members of a family, thus escaping the higher, progressive rates of tax imposed by the Federal income tax law and estate tax laws. Without this method of preventing evasion, Congress, it was stated, would not be able adequately to exercise its power to tax. The Court also overruled this argument of the collector.

A third argument advanced by the collector was that the taxpayer, having made the gift after the Congressional conference report had been made and just a few days prior to the final enactment of the gift tax, must be held to have acted with an intention of avoiding the tax; and that where such an intention could be presumed, the tax should

be upheld. The Court rejected this argument of the collector, stating at pages 445 and 446, that such a result

> "would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly know when and how he becomes liable for taxes —he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

The basis of the *Untermyer* decision, as explained in *Milliken* v. *United States,* 283 U. S. 15 (1931), is that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer with reasonable definiteness at the time of the particular voluntary act which was made the occasion of the tax. Mere retroactivity, it was conceded, may not be enough in some cases to make the tax so arbitrary as to be unconstitutional. Thus, for example, where a particular tax, such as the income tax, has been in force year after year so that the taxpayer is acquainted with its general nature and realizes that the rate of tax varies from year to year, a limited retroactivity will be upheld. The element of surprise is negligible. But where a novel tax is involved—such as the Gift Tax was in 1924 and the Silver Purchase Act Tax was in 1934—Congress cannot constitutionally make the tax apply retroactively to completed transactions.

It will thus be seen that the *Untermyer* case is decisive of the instant case, and requires that the Silver Purchase Act of 1934, in so far as it attempts to tax transfers con-

summated prior to the date of enactment, be held so arbitrary and capricious as to be invalid under the due process clause of the Fifth Amendment.

In the instant case, the respondent had purchased his silver contracts before the Silver Purchase Act of 1934 had been introduced in Congress or even publicly suggested for introduction by the President of the United States. No Federal excise tax of any kind on profits from dealings in silver was in force prior to the Silver Purchase Act of 1934. That Act introduced an unusual and extraordinary feature into the Federal tax system. Several of respondent's transactions were consummated on May 23, 1934 before the Act had even been introduced in the United States Senate. The other transactions were consummated on May 29, 1934 before the Act had been passed by either House of Congress. No evidence whatsoever has been shown that respondent carried on his silver transactions with a view to evading the Silver Purchase Act of 1934; in fact all of his purchases were made prior to the Presidential message first suggesting enactment of such an Act by Congress. The retroactive feature of the Act would apply equally to a transfer of silver which had been purchased years before a silver tax had even been considered.

All of the factors present in the *Untermyer* case, upon which the Court relied in reaching its decision that the gift tax if applied retroactively was unconstitutional, are present to an even greater degree in the instant case and impel a decision that the Silver Purchase Act of 1934, in so far as it attempts to levy a retroactive tax on the respondent, is invalid.

## II.

**The Government's attempt to distinguish the Untermyer case is unsuccessful.**

The Government contends that the retroactive silver profits tax is distinguishable from the retroactive *gift* tax held invalid in the *Untermyer* case on the grounds that (A) the retroactive application of the silver profits tax is supportable as a monetary measure whereas in the *Untermyer* case the tax was purely for revenue; and (B) the silver profits tax is an income tax and this court has held that *income* taxes can be imposed retroactively.

Neither of these contentions is sound. Although the present tax is a species of tax on income it is not an income tax in the ordinary sense. It is only an income tax in the sense that it is based on profits accruing to the taxpayer in respect of sales of silver. It is not the kind of income tax that this court has held may be imposed on the basis of transactions completed before the Act was passed.

The very nature of the present tax, applying as it does to profits without reference to when the silver was acquired, shows that it was designed purely as a revenue-raising measure, because it applies to sales of silver occurring after May 15, 1934 even though the silver had been acquired years before.

(A) *The retroactive application of the silver tax was designed purely as a revenue-raising measure.*

The Government's argument that the silver profits tax was designed not only to raise revenue but also to deter speculators from competing with the Government, after the President's message of May 22, 1934, had given notice of the Government's intention to purchase large quanti-

ties of silver at a maximum price of 54 cents per ounce, is clearly specious. Only in so far as the tax retarded buying would it reduce competition with the government by outside purchasers. Respondent had already bought his silver and no attempt was made to tax that transaction. Far from running counter to the Government's silver purchase program, the *selling* of silver by private holders would promote that program; the greater the amount of silver offered for sale the better the Government's opportunity for acquiring the desired amount of silver at a fair price.

This point was strongly brought out in the following statement in the opinion of the Court below (p. 7 of the Transcript of Record):

> "What we have said above applies to purchase and sales of silver after the passage of the act and when the Government had begun action thereunder. Then, as we have said above, if one contemplating the purchase of silver knew that a heavy tax would be imposed on any gain which resulted therefrom he would be quite likely to refrain from making the purchase in this country. But when the purchase was made before the silver purchase law was proposed, as it was in the instant case, we are at a loss to understand how putting a tax on the profits which might be made from subsequent sales could by any possibility affect the workings of the Act. The purchase had already been made. If it or any number of purchases made before the act was contemplated had any effect upon the price of silver, putting a tax on the sale would not change the result. We may concede, as we have above, that the tax might have some effect in the way of stopping future purchases of silver in this country but after the purchase has been made a tax levied upon the profits therefrom can serve

> no purpose but to bring some revenue into the Treasury. The market price of silver would remain the same to the Government or any other party and the enforcement of the act would in no way be assisted by the application of the tax under the circumstances presented by the plaintiff's case."

A tax on profits from sales of silver might be an appropriate supplement to the Government's monetary policy designed to mitigate the fluctuation in the world price of silver and to increase the amount of silver in our monetary stocks. But this is far from establishing the argument that the *retroactive feature* of the silver tax was justified as an auxiliary to the Government's monetary policy.

A similar argument was advanced by the Government in the *Untermyer* case, where it was pointed out that the Revenue Bill for 1924 proposed a drastic (50%) increase in the rates of estate tax, that the general tendency to escape estate taxes by making gifts *inter vivos* would be greatly accentuated by this proposed increase in rates, unless curbed by the threat of a retroactive gift tax, and that the retroactive feature of the gift tax should be sustained as an auxiliary to the Government's established power of taxing decedent's estates. But as is apparent from the decision in that case, the Court found the argument unconvincing.

Petitioner, attempting to show that the retroactive tax was designed to mitigate fluctuations in the world price of silver between the date of the introduction of the Silver Purchase Act and its passage, declares at p. 27 of its brief:

> "The Government could not enter the market as would a prudent buyer urged by such a necessity. The silver purchase policy of Congress was necessarily heralded

> to the world by the processes of formulating the legislation. The Government, accordingly, was in the position of bargaining with speculators who would know its position in advance."

But this argument is obviously unsound, in view of the following considerations:

In the first place, the Act was not made retroactive merely to the date (May 22) when a Silver Tax Bill was introduced in Congress, but to May 15th, a week before that date.

In the second place, the President, in outlining the Government's monetary policy, did not recommend that the silver tax be made retroactive. The retroactive feature of the tax was initiated by Congress itself, and that the dominant, if not the sole, purpose of making the tax retroactive was to produce revenue, not as an adjunct to the Government's monetary policy, is established by the report of the Ways and Means Committee of the House, quoted on page 11 of the Government's brief, in which the Committee said:

> "The tax being in the nature of a profits tax covers transactions taking place prior to enactment. Were this provision not included in the bill, the policy of equitably reimbursing the Government for the increase which its action may bring to the price of silver could be easily obstructed."

Petitioner attempts to bolster its argument that the retroactive silver profits tax is an implement of the Government's monetary policy, by pointing out that the French Republic, in its Monetary Law of October 1, 1936, provides for a special tax "comparable to the one involved in the present case". (Pages 17 and 18 of the Government's

brief.) This French tax, however, far from being analogous to our silver profits tax, brings out by contrast the very point which the Court below emphasized in its opinion, quoted above.* The French tax does *not* apply to profits on operations *commenced prior to the retroactive date specified in the act.* It applies exclusively to net profits ("benefices nets") from

> "liquidations des operations * * * engagees entre le 21 et 26 Septembre 1936"

that is, to profits from *operations entered into* between September 21 and 26, 1936. Profits from transactions entered into before, even though consummated after, September 21st are not taxed.

Reduced to its final terms, is not the Government's argument on the monetary point that the silver profits tax should not be judged as a tax because it is more than a tax; to-wit: a penalty for competing with the Government in the silver market? And if the so-called tax is a penalty, is not the statute which imposes it a penal statute, and to the extent that it applies to acts committed prior to the enactment of the statute, unconstitutional as an *ex post facto* law? Only recently this Court had occasion to hold in *United States* v. *Constantine,* 296 U. S. 287 (1935), that a so-called special federal tax on conducting a liquor business, contrary to state laws, was essentially a penalty, and therefore unconstitutional as an invasion of the police power reserved to the states.

For reasons stated above, we maintain that there is no sound basis for construing the silver tax as anything but a real tax. But if the tax was designed as a penalty, the

*Art. 14 of the French Monetary Law of October 1, 1926, published on page 1043 of the Journal Official of October 2, 1936, reads as follows: "Il est institué une taxe extraordinaire de 50 p. 100 sur les benefices nets qui resultront des comptes de liquidations des operations a terme engagées entre le 21 et 26 Septembre 1936 sur les bourses francaises des valeurs, a l'exception des operations effectuées sur le fonds d'Etat francais."

application of the tax to past transactions would, we submit, violate Article I Section 9 of the Constitution providing that no *ex post facto* law shall be passed by Congress.

(B) *The present tax is not the kind of tax on income that this court has held may be imposed on the basis of transactions completed before the Act was passed.*

The regular Federal income tax is not on specific transactions or even on an aggregate of transactions but on *net* income. Various income-producing transactions within the tax year are, it is true, taken into account in arriving at the amount of the net taxable income to which the tax is to be applied. But these transactions are only one part of a hodge-podge comprising also various deduction and credit items occurring within the same tax year, which frequently entirely offset the sum of the income transactions leaving no statutory net income on which to base the rates of tax prescribed by the statute. This feature of our income tax brought out in *Peck* v. *Lowe*, 247 U. S. 165 (1918), sustaining the federal income tax on the net income of a taxpayer engaged in the exporting business, in which Mr. Justice VAN DEVANTER, delivering the opinion of this Court, said (p. 175):

> "At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins."

The silver tax, on the other hand, is a tax on specific transactions; the tax base and rates of tax are not af-

fected by other income which the taxpayer may receive or deductions to which he is entitled, in computing net taxable income subject to income tax. The tax is not even one on *net* income from the transactions in silver, but is to a large extent on gross profits, because, while the Act provides for the deduction of "allowed expenses", Article 44 of Treasury Regulations 85, defining what expenses shall be allowed, specifically provides that "interest, taxes, and charges in the nature of overhead may not be included in the allowed expenses." The silver tax does not take past transactions into account, along with various other facts, merely as a reasonable way of arriving at the taxpayer's presumable ability to pay; it imposes a tax on the past transactions as such. Such a tax, however classified, is of the same general type as that which this court, in the *Untermyer* case, held could not be retroactively imposed on transactions completed before its enactment.*

The Government contends that the decisions of the United States Supreme Court in *Brushaber* v. *Union Pacific Railroad Company,* 240 U. S. 1, and *Lynch* v. *Hornby,* 247 U. S. 339, which sustained the constitutionality of the Income Tax Law of October 3, 1913, imposing a tax based on net income from March 1, 1913 to December 31, 1913, establish that even a brand new income tax law can be retroactively applied.

There are two decisive answers to such a contention. In the first place, if the 1913 income tax was in fact a retroactive tax in the sense that the gift tax of 1924

*If the silver profits tax were construed to be an "Income tax" within the meaning of Section 23(c) of the Revenue Act of 1934 the tax could not be deducted in computing net income subject to the regular normal tax and surtax because this prohibits the deduction of federal income taxes in computing net taxable income, and taxpayers subject to the highest brackets of income tax would be taxable on profits derived from the sale of silver at an aggregate rate of 113%; 50% silver profits tax, in addition to a 59% surtax and 4% normal income tax.

and the silver tax now in question are retroactive, the decisions in the *Brushaber* and *Hornby* cases must be regarded as having been overruled by the decision in the *Untermyer* case. Indeed, counsel for the Government in the *Untermyer* case strenuously argued that if the Court held the retroactive feature of the 1924 Gift Tax Law unconstitutional, this would in effect overrule the decisions in the *Brushaber* and *Hornby* cases.

The second answer is that the Act of October 3, 1913 was not in any true sense a retroactive statute. That Act provided for the assessment and payment in June 1914 of a tax computed on the net income of the taxpayer for the period from March 1, 1913 to December 31, 1913. The figure of net income on which the tax was based was one which did not become crystallized or determinable until December 31, 1913, almost three months subsequent to the enactment of the statute. December 31, 1913, not March 1, 1913, was the effective date of that Act.

In the present case the tax is based on specific transactions consummated prior to the enactment of the Act. These transactions are not mere items entering into a fluctuating quantity that will not be definitely fixed until a time subsequent to the enactment of the statute, but themselves form an independent basis for the imposition of the tax.

**The decisions relied on by the Government do not support the contention that wholly new taxes on business transactions can be subject to retroactive taxation.**

On page 43 of its brief, the Government cites and discusses three cases in support of its contention that wholly new excise taxes on business may be retroactively applied. In two of these cases, *Patton* v. *Brady* and *Hecht*

v. *Malley,* the statute merely modified an existing tax, and in the third, *Billings* v. *United States,* the tax was not in fact retroactive. These cases do not therefore sustain the Government's contention.

### Unconstitutionality of Retroactive Tax Will Not Affect Remainder of Act.

Congress apparently doubted the validity of the retroactive feature of the silver purchase tax and took pains (1) completely and clearly to separate the retroactive feature of the Act from the rest of the Act, and (2) to provide for a separate return showing all taxable silver transactions during the retroactive period.

Subdivision 10 of Schedule A of Title VIII of the Revenue Act of 1926, as added by the Silver Purchase Act of 1934, provides that:

> "This subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply."

An entirely separate provision is likewise made in the regulations for retroactive transactions, Reg. 85, Art. 70 (C. C. H. Federal Tax Service, 1935, Vol. II, § 3092). And a separate form of return is provided (Form 4).

Accordingly, no interference with the operation of the remainder of the Silver Purchase Act would be involved

in holding the retroactive tax feature unconstitutional. It is separable substantively and administratively.

## Conclusion.

The retroactive silver tax is not in form or in practical effect an increase in the income tax. It is an excise tax on silver transfers. It was imposed for the first time as part of the Federal tax system by the Silver Purchase Act. To the extent that it is imposed retroactively upon a legitimate transfer which was irrevocably completed at a time when no excise tax thereon was payable, it is so unreasonable and arbitrary as to be unconstitutional under the due process clause of the Fifth Amendment. *Untermyer v. Anderson, supra.* It is pure speculation to argue that the Respondent's profit on the transactions which were taxed was due to Governmental action with respect to silver, and that a retroactive tax upon the profits is therefore "equitable", nor was the *retroactive tax feature* of the Silver Purchase Act enacted as a necessary adjunct and aid to the Government's monetary policy.

The retroactive application of the tax is no different in principle from the retroactive application of the gift tax of 1924 and the decision of the United States Supreme Court holding such retroactivity unconstitutional is decisive of the present case.

Respectfully submitted,

BERNHARD KNOLLENBERG,
*Counsel for Respondent,*
25 Broadway,
New York, N. Y.

GEORGE DE FOREST LORD,
*Of Counsel.*

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CHARLES ELMORE CRO
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IN THE

# Supreme Court of the United States

October Term, 1936

No. 97

THE UNITED STATES, *Petitioner,*

*v.*

PERCY K. HUDSON

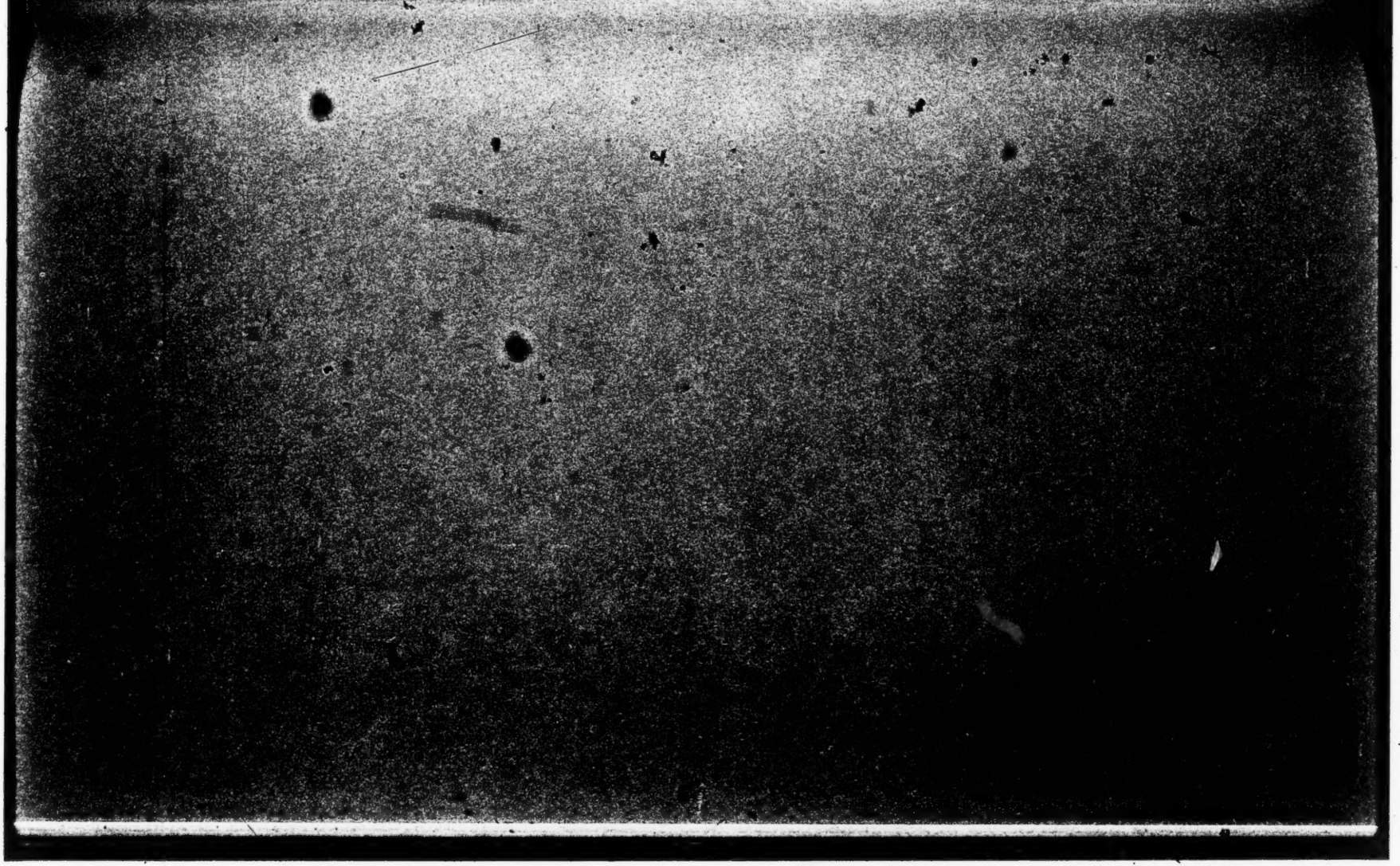
**On Writ of Certiorari to the Court of Claims**

## BRIEF OF AMICUS CURIAE

BREWSTER & MACLEAN,
AMICUS CURIAE,
Washington, D. C.

KINGMAN BREWSTER,
O. R. FOLSOM-JONES,
A. H. CONNER,
JOHN WARD CUTLER,
*Of Counsel.*

Eynon Printing Co., Inc., Washington, D. C.



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IN THE

# Supreme Court of the United States

October Term, 1936

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No. 97

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THE UNITED STATES, *Petitioner,*

*v.*

PERCY K. HUDSON

---

**On Writ of Certiorari to the Court of Claims**

---

## BRIEF OF AMICUS CURIAE

### STATEMENT

The above suit is to recover taxes paid under the Silver Purchase Act of 1934 (48 Stat. 1178) which levied a stamp tax on the transfer of any interest in silver bullion. The tax so imposed was 50 per centum of the excess of the sale price over cost and specified expenses. The Act was approved June 19, 1934 and was made retroactive with respect to transfers made on and after May 15, 1934. The taxes sought to be recovered are with respect to transfers made by respondent during the period the Act applied retroactively.

In the Court below the Government contended that the tax was valid under both the monetary and the taxing

powers of Congress. With respect to the taxing power it was argued "that in its practical effect the tax was one upon income, and that being an income tax, it can be imposed retroactively."[1]

The question of how far Congress may go in imposing taxes retroactively has become, and will continue to be, of great importance to taxpayers, and the decision in this case upon that issue necessarily will be of constructive assistance in the framing of future tax legislation. The decision of necessity will also bear importantly upon the question of retroactivity presented with respect to the so-called "tax upon unjust enrichment," imposed by Title III, Revenue Act of 1936,[2] which was designed to recoup for the Government the taxes imposed under the Agricultural Adjustment Act and held to be unconstitutional in *United States* v. *Butler,* 297 U.S. 1. While the provisions of the Act denominate it as a tax upon net income, it is in fact an excise imposed retroactively upon the sale of arti-

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[1] *Hudson* v. *United States,* 12 F. Supp. 620, 623.

[2] The "unjust enrichment" tax of 80 per cent is denominated a tax upon that portion of net income (a) from the sale of articles to the extent that such income is attributable to shifting to others the burden of any unpaid Federal excise tax imposed with respect to such articles; (b) from reimbursement from vendors of Federal excise tax burdens which had been included in the price paid for goods and which the taxpayer in turn had shifted to his vendees; and (c) from refunds and credits for Federal excise taxes erroneously or illegally collected, which had been shifted to others. It disregards any loss arising from other transactions of the taxpayer and whether the taxpayer had a taxable net income for the taxable year as a whole (§501 (l)).

cles with respect to which the unconstitutional processing tax was imposed.[3]

The observations in this brief will be confined to what are conceived to be the principles by which the constitutionality of the retroactive exercise of the taxing power should be tested.

## ARGUMENT

The actual result which follows from the exaction of a tax should be the determining factor as to whether or not its imposition is so arbitrary and capricious as to violate the due process clause. It is the practical effect of the tax and not what Congress may have called it which determines its nature.[4] The mere fact, therefore, that the tax in question is measured by the income or profits derived from a particular transaction does not mean that it may be retroactively applied.

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[3] The imposition of the "unjust enrichment" tax cannot be justified as a necessary adjunct in order to insure the effective exercise of the taxing power (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Milliken* v. *United States*, 283 U. S. 15, 24) because it has no prospective application, at least so far as the invalidated processing tax is concerned. So far as it is based upon the invalidated processing tax, the "unjust enrichment" tax applies only to taxable years ending during the calendar year 1935, and the period ending January 6, 1936, which was the date of the decision in the *Butler* case (§501, 504, Revenue Act, 1936.)

[4] *Nicol* v. *Ames*, 173 U. S. 509, 515; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292.

## I

### Retroactive Taxation Has Been Upheld Only Where Pursuant to an Established Policy

The retroactive application of taxes has been upheld with respect to income for the current year [5] where such application was pursuant to an established policy of taxation well understood by those taxed,[6] and the taxpayer necessarily must assume the risk of an "increase in the tax burden which might result from carrying out the established policy." [7]

The ratification of taxes and impositions erroneously as-

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[5] *Burnet* v. *Wells*, 289 U. S. 670, 682-683; *Cooper* v. *United States*, 280 U. S. 409; *Reinecke* v. *Smith*, 289 U. S. 172.

[6] *Stockdale* v. *Insurance Companies*, 20 Wall. 323; *Lake Shore, etc., Railroad Co.* v. *Rose*, 95 U. S. 78; *Western Union Railroad Co.* v. *United States*, 101 U. S. 543; *Milliken* v. *United States*, 283 U. S. 15; *Patton* v. *Brady*, 184 U. S. 608; *Hecht* v. *Malley*, 265 U. S. 144; *Phillips* v. *Dime Trust and Safe Deposit Co.*, 284 U. S. 160, 166; *Fawcus Mach. Co.* v. *United States*, 282 U. S. 375. In *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 339, the adoption of the Sixteenth Amendment, especially in the light of the income tax acts which preceded it, established a policy to tax income "from whatever source derived." See also cases in Note 5. In *R. Hoe & Co.* v. *Commissioner* (C. C. A. 2d), 30 F. (2d) 630, involving war profits taxes under the Revenue Act of 1918, the question of retroactivity was not presented or decided. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, cer. den. 271 U. S. 661, involved only the retroactive application of an increase in excess profits taxes over those provided in previous acts.

[7] *Milliken* v. *United States*, *supra*, p. 23; *MacLaughlin* v. *Alliance Ins. Co.*, 286 U. S. 244, 250.

sessed does not involve the question of retroactivity. Such cases turn upon the right of the principal to ratify the acts of an agent, which were beyond the scope of his delegated powers, but which might have been delegated by the principal in the first instance[8]

The cases in which special assessments for past benefits have been upheld justify such assessments in their retroactive application upon several grounds.[9] The element of an established system of taxation is present, however, in that, historically, the cost is frequently charged to the abutting property in proportion to the benefit conferred. The benefit being a continuing one, the cost may be imposed upon the beneficiaries whether before or after the improvements are made.[1]

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[8] *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8; *Graham* v. *Goodcell*, 282 U. S. 409, 429. The distinction between ratifying an assessment made without authority and imposing a new tax retroactively is pointed out in the *Charlotte Harbor Ry.* case where it distinguished *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, on the ground that in the *Forbes Boat Line* case there was no charge for the use of a Government canal at the time such use was availed of, and therefore the Legislature could not retroactively impose a charge for such use. See *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637.

[9] *Wagner* v. *Baltimore*, 239 U. S. 207; *Charlotte Harbor Ry.* v. *Welles, supra*; *Seattle* v. *Kelleher*, 195 U. S. 351.

[1] In *Seattle* v. *Kelleher, supra*, this Court answered the contention that the assessment for past benefits could not be constitutionally laid upon property in the hands of a bona fide purchaser who acquired the property after the improvements were made but prior to assessment, by saying that

## II

### A Retroactive Tax Is Invalid When Laid Upon an Activity or with Respect to a Privilege not Theretofore Specifically Taxed.

Where the tax is laid retroactively upon an activity or in respect to a privilege not theretofore a subject for special taxation, this Court has held that such tax may not be retroactively applied.

In *Nichols* v. *Coolidge,* 274 U.S. 531, the Commissioner sought to include in the gross estate of Mrs. Coolidge the value of property transferred in trust in 1907, on the theory that under the Revenue Act of 1918 such a transfer was one intended to take effect in possession or enjoyment at or after deah. The Federal policy of estate taxation was first adopted in the Revenue Act of 1916. At the time of the transfer in 1907, therefore, there was no established system or policy of estate taxation by which the settlors could or should have known that a transfer intended to take effect at or after death might be made the basis of a tax. This Court concluded that to include in the gross estate the value of property so transferred was arbitrary, capricious and amounted to confiscation. In *Coolidge* v. *Long,* 282 U.S. 582, the same trust was considered with respect to the retroactive application of the Massachusetts inheritance tax. The trust was created on July 29, 1907. The first relevant statute imposing inheritance taxes upon such transfers was approved on June 27, 1907, about 30

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such a purchaser could not buy without notice—that the improvements were visible upon the ground and it was for the purchaser to inquire whether they had been paid for.

days prior to the transfer, but was not effective until September 1, about 5 weeks subsequent thereto.[2]

The same principle was applied in *Blodgett* v. *Holden*, 275 U.S. 142, 276 U.S. 594, and *Untermyer* v. *Anderson*, 276 U.S. 440. The gift tax imposed by the Revenue Act of 1924 was new to the Federal system of taxes. In the *Untermyer* case the gift was made in May, 1924, about a week before the passage of the Revenue Act which for the first time imposed a tax upon such gifts. The Court held (p. 445) that "so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924" its provisions violated the due process clause.

The principle was also applied in the attempt retroactively to impose tolls for the use of a Government canal in *Forbes Boat Line* v. *Board of Commissioners, supra.* In this case in the Court below the Government contended that the *Forbes Boat Line* case turned upon the principle of contractual relations between the user of the canal and the State of Florida, basing this argument on the use in the opinion in the *Forbes Boat Line* case of the words "without any promise of reward" and "gratuitous deposit of rolls". The analysis of the *Forbes Boat Line*

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[2] No question of retroactivity is involved in the inclusion of the value of estates by the entirety or the interest of a decedent in a joint tenancy, even though such estate or interest was created before 1916. It is the shifting of an economic benefit at death to which the tax applies. *Third Nat. Bank* v. *White*, 287 U. S. 577. There was no shifting of economic benefits at death in *Nichols* v. *Coolidge*. Prior to the death of Mrs. Coolidge the settlors had divested themselves of their entire interest in the property.

case, however, in *Charlotte Harbor Ry.* v. *Welles, supra* (see Note 8), indicates that the underlying principle involved was the retroactive imposition of a tax upon a privilege which, when exercised, the user had no reason to believe was subject to a charge.[3] This was a recognition of the rule that had the taxpayer known that such a tax would be laid, or might reasonably be anticipated, he might

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[3] The case of *Billings* v. *United States*, 232 U. S. 261, concerned the validity of an excise upon the use of foreign-built yachts imposed by the Tariff Act of August 5, 1909. The tax was to be levied and collected annually on September 1st. It was held that the tax was upon the use for any time during the year. The use between August 5, 1909, the effective date of the Act, and September 1, 1909, when the tax was due, subjected such use to the whole tax, the test being "the fact of use, not its extent or its frequency" (p. 280). Use for but one day during the above period would have had the same effect. In this sense the Act was prospective in its application. The statement in the opinion (p. 282) that the Act would not be beyond the power of Congress to adopt, even if it be conceded that it had, in some respects, a retroactive effect, was not necessary to the decision of the case. Cf. the later decisions in *Nichols* v. *Coolidge* and *Untermyer* v. *Anderson*. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the *tax* was laid *prospectively* upon the privilege of doing business in a corporate capacity. The measure of the tax was a percentage of the net income for the year. The Act was passed August 5, 1909. The only element of retroactivity involved, therefore, was with respect to the *measure* of the tax, and then only in the first year of its application. In determining the constitutionality of the tax (p. 165) the Court clearly points out the distinction between the *subject* of the tax and the *measure* of it.

have avoided it by refraining from exercising the privilege.[4]

## III

### The Silver Purchase Tax Is Invalid as Applied Retroactively

Applying the foregoing principles to the tax involved in this case it appears that for the first time, on June 19, 1934, a tax was specifically directed at the particular privilege of transferring an interest in silver bullion. There is no question as to the right of Congress to impose such a new tax prospectively, but to impose it retroactively upon transactions completed prior to the effective date of the taxing Act brings the question of the arbitrariness of the retroactive imposition squarely within the principle which the Court applied in *Nichols* v. *Coolidge* and *Untermyer* v. *Anderson*. It is true that any gain from such a transaction would be subject to the ordinary income tax and respondent can be charged with notice that Congress had the right to change the rate or the method of computation of the tax as generally applied to all income-producing activities. When Congress, however, without warning, singles out one particular income-producing activity for a special tax not applicable generally, it is obvious that it is arbitrary so far as such tax applies retroactively to transactions completed before it was imposed.

In its petition for certiorari in this case (p. 4) petitioner states that the transfers here involved were already subjected to a transfer tax under Subdivision 4, Schedule A, Title VIII, Revenue Act of 1926. So much of Subdivision

[4] *Lewellyn* v. *Frick*, 268 U. S. 238, 252.

4 as is material is found below.[5] It is not clear just what the purpose of this reference is unless it be to establish a policy of taxation which might reasonably be supposed to put the respondent upon notice with respect to the taxation of transfers made prior to the passage of the Silver Purchase Act. If such is the purpose we submit that the transfers involved in this case were not subject to tax under Schedule A-4 above referred to.

It will be noted that the tax is not imposed specifically upon the transfer of any interest in silver bullion, but applies only to sales or agreements to sell products or merchandise at or under the rules or usages of an exchange, board of trade or other similar place, and then only upon sales and agreements for future delivery. In the instant case it does not appear that the transfer was made at or under the rules or usages of any exchange, board of trade or similar place, nor was it a sale or agreement to sell a product or commodity for future delivery. What respondent sold was his interest in a contract under

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[5] Subdivision 4 of Schedule A was amended by §726(a), Revenue Act of 1932, and §612(a), Revenue Act of 1934, with respect to the rate of tax only. The present rate is 3 cents. So far as applicable, the Subdivision as amended is as follows:

"4. Produce, sales of, on exchange: Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each $100 in value of the merchandise covered by said sale or agreement of sale or agreement to sell, 3 cents, and for each additional $100 or fractional part thereof in excess of $100, 3 cents: * * *"

which a third party was obligated to make delivery of silver bullion some time in the future.[6]

It is submitted that the tax under Schedule A-4 not only did not apply to the transfers involved in this case, but could not reasonably be construed as establishing a policy for singling out such transfers for special taxation or as a warning to respondent that the tax involved in this case might later be imposed.

## CONCLUSION

From the foregoing it appears that this Court has been consistent in its application of the due process clause with respect to retroactive impositions under the taxing power. The principle involved is obviously one of notice,—of being forewarned. The taxpayer may not complain of a retroactive imposition, not otherwise arbitrary or capricious, which might reasonably be anticipated. But a tax imposed for the first time upon a particular privilege theretofore enjoyed without charge, a reaching back so as to burden unexpectedly a completed transaction, is obviously arbitrary and unreasonable. To tax retroactively a completed transaction without warning is to change the rules of the game after the game is finished.

We respectfully submit that so far as the retroactive exercise of the taxing power in this case is concerned, the

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[6] It will also be noted that the tax imposed by Subdivision 4 of Schedule A is not upon the profits derived from the sale, but is measured by the value of the merchandise involved, without regard to any profit or loss which might accrue.

decision of the Court of Claims was correct and should be affirmed.

BREWSTER & MACLEAN,
AMICUS CURIAE,
Washington, D. C.

KINGMAN BREWSTER,
O. R. FOLSOM-JONES,
A. H. CONNER,
JOHN WARD CUTLER,
*Of Counsel.*

# SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1936.

The United States, Petitioner, *vs.* Percy K. Hudson. } Certiorari to the Court of Claims.

[January 11, 1937.]

Mr. Justice Van Devanter delivered the opinion of the Court.

Respondent bought on May 3 and sold on May 23 and 29, all in 1934, certain futures contracts for the delivery of 500,000 ounces of silver, and realized therefrom, after deducting allowed expenses, a profit of $8,621.96. He paid a tax of 50% of this profit in obedience to the taxing provision of the Silver Purchase Act of June 19, 1934,[1] duly but unsuccessfully sought to have the amount of the tax refunded, and then brought suit in the Court of Claims to recover the same. The court held the tax invalid, as retroactively applied to respondent's sales, and gave judgment accordingly. 12 F. Supp. 620; 13 F. Supp. 640. The case is here on certiorari.

The Silver Purchase Act, in § 8, imposes on all transfers of any interest in silver bullion, where the price for which such interest is transferred exceeds the total cost and allowed expenses, a tax of 50 per centum of such excess, and requires that the tax be paid by affixing to a memorandum of the sale lawful stamps in the amount of the tax. The section further provides that the tax, besides reaching transfers thereafter made, shall be applicable to transfers made on or after May 15, 1934, and prior to the date of the act, with the qualification that as to such prior transfers the tax shall be paid in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulation prescribe.

The question presented for decision is whether, in view of the restraints of the due process of law clause of the Constitution,[2] the

[1] C. 674, § 8, 48 Stat. 1178.

[2] The Fifth Amendment contains the due process of law clause applicable to the United States.

retroactive provision under which the tax was exacted from the respondent is an admissible exertion of the power to tax.

Examination of the taxing provision and of pertinent decisions shows, as we think, that the answer must be in the affirmative.

The taxing provision does not impose a tax in respect of all transfers, but only in respect of such as yield a profit over cost and allowed expenses. If there be no profit there is to be no tax. If there be a profit the tax is to be 50% of it. Thus a profit is made the occasion for the tax and also the measure of it. Because of this, counsel for the Government contend that the tax is a special income tax; and we think the contention is sound.

It is not material that such profit is taxed, along with other gains, under the general income tax law, for Congress has power to impose an increased or additional tax if satisfied there is need therefor. *Patton* v. *Brady,* 184 U. S. 608, 620-622.

As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution. *Stockdale* v. *Insurance Company,* 20 Wall. 323, 331, 332, 341; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Cooper* v. *United States,* 280 U. S. 409, 411. And see *Milliken* v. *United States,* 283 U. S. 15, 21. The cases on which the Court of Claims partly rested its decision were both examined and distinguished in *Cooper* v. *United States* and *Milliken* v. *United States.*

The period of retroactivity prescribed for this taxing provision reaches backward from June 19, 1934, the date of the act, to and including May 15, 1934,—35 days. For some months prior to this period there was strong pressure for legislation requiring increased acquisition and use of silver by the Government, and several bills providing therefor were presented in the Senate and House of Representatives. On May 22 the President sent to Congress a message[3] recommending legislation for increasing the amount of silver in our monetary stocks and further recommending the im-

[3] Hearings on H. R. 9745, Silver Purchase Act of 1934, pp. 1 and 2.

position of a tax of at least 50% on profits accruing from private dealing in silver. The bill which became the Silver Purchase Act was introduced May 23 in response to this message. In these circumstances we think the period of retroactivity fixed in the act is not unreasonable, but consistent with the practice sustained by this Court in the cases already cited.

It results that the Court of Claims erred in holding the retroactive provision invalid as applied to respondent's sales.

*Judgment reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*